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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA

DEFENDERS OF WILDLIFE, et al.,
 Plaintiffs,
 v.
 U.S. FISH AND WILDLIFE SERVICE, et al.,
 Defendants.

Case No. 4:21-cv-00344-JSW
 4:21-cv-00349-JSW
 4:21-cv-00561-JSW

WILDEARTH GUARDIANS, et al.,
 Plaintiffs,
 v.
 DEBRA HAALAND, U.S. SECRETARY OF
 THE INTERIOR, et al.,
 Defendants.

**FEDERAL DEFENDANTS' NOTICE OF
 MOTION AND CROSS-MOTION FOR
 SUMMARY JUDGMENT;
 MEMORANDUM OF POINTS AND
 AUTHORITIES IN SUPPORT;
 OPPOSITION TO PLAINTIFFS'
 MOTION FOR SUMMARY JUDGMENT**

NATURAL RESOURCES DEFENSE
 COUNCIL, INC.,
 Plaintiffs,
 v.
 UNITED STATES DEPARTMENT OF THE
 INTERIOR, et al.,
 Defendants.

Date: November 12, 2021
 Time: 9:00 AM
 Courtroom: 5
 Judge: Hon. Jeffrey S. White

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on November 12, 2021, at 9:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 5 of the above-entitled Court, located at 1301 Clay Street, Oakland, California, or by video teleconference, Federal Defendants the U.S. Fish and Wildlife Service, et al., by and through undersigned counsel, will move for summary judgment for the reasons more fully set forth in the accompanying memorandum of points and authorities.

DATED: August 20, 2021

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ACRONYMS

APA	Administrative Procedure Act
AR_	Administrative Record (ECF 58 in 4:21-cv-344-JSW)
DPS	Distinct Population Segment
ECF	Docket entries in 21-cv-344-JSW
ESA	Endangered Species Act
FWS	U.S. Fish and Wildlife Service
NMFS	National Marine Fisheries Service
NRM	Northern Rocky Mountain
Pls. Br.	Plaintiffs' Joint Motion for Summary Judgment, in 21-cv-344-JSW
Service	U.S. Fish and Wildlife Service
SPR	Significant portion of its range

1 I. INTRODUCTION

2 From European settlement through the mid-1900s, humans tried to eradicate the gray
3 wolf (*Canis lupus*) from the lower 48 United States. Gray wolves were eliminated in the lower
4 48 States, except in northern Minnesota, but the concerted campaign to eradicate the gray wolf
5 failed. Beginning in the 1960s, the Federal government aggressively worked to protect, re-
6 establish, and recover gray wolves in the lower 48 States. By the 1970s, the U.S. Fish and
7 Wildlife Service protected the gray wolf under the Endangered Species Act (ESA) throughout
8 the lower 48 States. Under the ESA authority, the Service also reintroduced gray wolves to
9 central Idaho and Yellowstone National Park. Since that time, domestic gray wolves have
10 achieved recovery. By the early 2000s, ESA protections and reintroductions led to the expansion
11 of gray wolves in the lower 48 States, resulting in abundant, widely distributed, and genetically
12 connected populations.

13 Gray wolves occur today in two metapopulations,¹ one in the Western United States and
14 one in the Great Lakes region. In the Western United States, over 2,400 gray wolves occur across
15 Idaho, Montana, Wyoming, Washington, Oregon, and California. And wolves continue to
16 expand their range in the Western United States, with recent documentation of wolves in
17 Colorado. The Great Lakes wolves are even more robust, with over 4,200 wolves occupying
18 Minnesota, Wisconsin, and Michigan. Both the Western United States and Great Lakes
19 metapopulations are connected to nearly 30,000 wolves in Canada, meaning wolves in the
20 United States no longer exist in isolated populations. They are stable populations within a vast,
21 interconnected network of gray wolves inhabiting North America.

22 With ESA protections and the cooperative efforts of States, Tribes, non-governmental
23 organizations, and many others, the gray wolf expanded to the point of recovery. Congress

24
25 ¹ A metapopulation is “a population that exists as partially isolated sets of subpopulations that
26 ‘interact’ when individuals move from one subpopulation to another. A metapopulation is widely
27 recognized as being more secure over the long term than are several isolated populations that
28 contain the same total number of individuals ... because adverse effects experienced by one of
its subpopulations resulting from genetic drift, demographic shifts, and local environmental
fluctuations can be countered by occasional influxes of individuals and their genetic diversity
from the other components of the metapopulation.” AR_43.

1 mandated that success under the ESA results in species management being returned to the States
 2 and Tribes—the sovereigns with primary responsibility over resident wildlife species. Here,
 3 because the gray wolf entities delineated on the ESA’s list of endangered and threatened species
 4 before 2020 were not entities that Congress allowed the Service to protect, delisting was
 5 warranted for that reason alone. Before taking that step, however, the Service undertook a
 6 conservative analysis of the gray wolf’s status throughout the lower 48 States to “eliminate the
 7 possibility of removing protections for any gray wolves that might meet the Act’s definition of a
 8 ‘species’ and might be endangered or threatened.” AR_44. The Service possesses substantial
 9 expertise on gray wolves and ESA implementation, and it made a reasoned determination that
 10 the best scientific and commercial data available in 2020 established that gray wolves no longer
 11 met the definition of a threatened or endangered species. The Service thus removed ESA
 12 protections in the 2020 Rule for the two previously listed wolf entities—the Minnesota and 44-
 13 State entities. AR_38, 153-54.

14 Several plaintiff groups and amici now challenge the 2020 Rule. The bases for these
 15 challenges vary, but they share a central theme: the Service should not permit States to manage
 16 gray wolves until wolf populations become more widely distributed and secure throughout their
 17 historical range in the lower 48 States. The Service shares the desire for broader wolf distribution
 18 and recolonization in the lower 48 States. But the ESA—the statute the Service must follow—
 19 does not allow the Service to withhold regulatory action on gray wolves once it determines that
 20 the species has recovered. Policy preferences for the Service to protect wolves beyond recovery
 21 do not provide a legal basis for setting aside the Service’s expertise. The Service properly set
 22 aside these policy questions over how many gray wolves beyond biological recovery might be
 23 desirable and conformed its rulemaking to the ESA, as written, informed by the best scientific
 24 evidence available to it.²

25 ² The Service does not dispute the significant Tribal interests in gray wolves, as expressed in
 26 their amicus filings. *See* ECF 87-1; ECF 86-1. Nor, as Michigan and Oregon argue, is the Service
 27 deciding “where a species may be allowed to live.” ECF 83-2 at 4. Rather, the Service is
 28 applying the ESA as Congress intended. The statute does not authorize the Service to preempt
 State and Tribal management of wildlife because of the policy considerations expressed by
 Plaintiffs, various amici, and some of the peer reviewers.

1 The Service’s 2020 Rule and its administrative record reflect that the Service achieved
 2 these objectives. The Court should decline Plaintiffs’ invitation to usurp the Service’s authority
 3 by dictating how the Service should administer the ESA for gray wolves in the lower 48 States.
 4 Judicial restraint is particularly appropriate here because Plaintiffs focus much of their argument
 5 on whether the Service should protect *new* gray wolf entities, not the Minnesota and 44-State
 6 entities that the Service addressed in the 2020 Rule. Plaintiffs have already petitioned the Service
 7 to list Northern Rocky Mountain (NRM) and Western North American gray wolf populations
 8 (the NRM population, except Wyoming, was congressionally delisted in 2011, and the Service
 9 later delisted the Wyoming wolves).³ The Service is considering those petitions under currently
 10 available scientific information and regulatory conditions. The ESA’s petition process, not
 11 judicial review, is the proper mechanism for Plaintiffs to request that the Service consider the
 12 protected status of gray wolves based on the facts and evidence that exist today.

13 The Service’s 2020 Rule follows the law and is supported by the administrative record.
 14 The Court should uphold the rule under the deferential standard of review that applies in this
 15 case and grant the Service’s motion for summary judgment.

16 **II. BACKGROUND**

17 **A. Statutory background—the Endangered Species Act (ESA)**

18 Congress enacted the ESA in 1973 to, in part, “provide a program for the conservation of
 19 [] endangered species and threatened species.” 16 U.S.C. § 1531(b). Such species are “listed,” or
 20 added to the Lists of Endangered and Threatened Wildlife and Plants, 50 C.F.R. §§ 17.11, 17.12.
 21 “The cornerstone of effective implementation of the [ESA] is the process to determine which
 22 species should be listed as endangered or threatened and which listed species should be
 23 reclassified or removed from the lists (delisted).” S. Rep. No. 97-418, at 10 (May 26, 1982).
 24 Under the statutory process, the Service first identifies the “species” at issue, which Congress
 25 defined as a species, subspecies, or “distinct population segment of any species of vertebrate fish
 26 or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16).

27 ³ See AR 21766; see also May 26, 2021 Petition, <https://ecos.fws.gov/docs/tess/petition/992.pdf>;
 28 July 29, 2021 Petition, <https://ecos.fws.gov/docs/tess/petition/3352.pdf>.

1 The Service next considers five statutory factors as applied to the “species,” to determine
 2 whether it meets the definition of an “endangered species” or a “threatened species.” 16 U.S.C. §
 3 1533(a)(1)(A)-(E). An endangered species is a species that is “in danger of extinction throughout
 4 all or a significant portion of its range,” *id.* § 1532(6), while a threatened species is a species that
 5 is “likely to become an endangered species within the foreseeable future throughout all or a
 6 significant portion of its range,” *id.* § 1532(20). The Service must base any final listing or
 7 delisting determination on the best scientific and commercial data available, after considering
 8 any State and foreign efforts to protect the species. *Id.* § 1533(b)(1)(A).

9 After listing a species, the Service works to bring the species to the point at which the
 10 ESA’s protections are no longer necessary. 16 U.S.C. § 1532(3) (defining “conserve”). The ESA
 11 imposes a duty on the Service to review the list of endangered and threatened species and
 12 determine whether any species should be removed from the list (“delisted”). *Id.* § 1533(c)(2); 50
 13 C.F.R. § 424.11(e). Congress required that, for any determination to remove ESA protections for
 14 a species, the Service must apply the same statutory criteria it uses to add species to the list. 16
 15 U.S.C. § 1533(c)(2) (delisting decisions made “in accordance with the provisions of subsections
 16 (a) and (b)” of this section); 50 C.F.R. § 424.11(e)(2). That is, the same statutory standards and
 17 process apply when the Service either “lists” or “delists” a species. *Id.*

18 When the Service removes ESA protections for a recovered species, it must monitor the
 19 species for at least five years. 16 U.S.C. § 1533(g). If the monitoring reveals a significant risk to
 20 the species, the ESA permits the Service to relist the species using the ESA’s emergency listing
 21 procedures. *Id.*; *see also id.* § 1533(b)(7).

22 **B. Factual and Regulatory Background**

23 **1. Gray wolf biology**

24 Gray wolves are one of the most adaptable and resilient land mammals on earth.
 25 AR_403-405, 426. They thrive under nearly every environmental condition, and they have high
 26 birth and growth rates that allow populations to increase in size even when faced with human-
 27 caused mortality rates ranging from 17 to 48% annually. AR_57; AR_405. From 1999 to 2008,
 28

1 for example, humans killed on average 16% of the NRM wolves annually,⁴ but the population
 2 grew at an average annual rate of 24% during this time. AR_57. From 2009 to 2015, human-
 3 caused mortality rates increased to 29% annually, primarily from regulated hunts, and the NRM
 4 wolves continued to grow by an average of 1% annually. *Id.*

5 Wolf populations also can rapidly recover from events that cause population declines.
 6 Regulated hunting in Wisconsin resulted in 374 wolf mortalities over two years and reduced the
 7 population from an estimated 809 wolves in 2012 to 660 wolves in 2014. AR_419-420. The
 8 State then reduced harvest quotas, which led to an increased population of 746 wolves the next
 9 year, and reinstated ESA protections in 2015 led to over 900 wolves by 2019. *Id.*; AR_92; *see*
 10 *also* AR_38285, 38293.

11 Pack structure is adaptable and resilient. Wolves normally live in packs ranging from an
 12 average of 7 wolves to more than 20 wolves. AR_403. Packs typically consist of a breeding pair,
 13 pups, offspring from previous years, and occasionally an unrelated wolf. *Id.* The top-ranking
 14 male and female in each pack typically reproduce, but breeding members can be quickly
 15 replaced and pups reared by other pack members. AR_403-04; AR_46-47. And wolves are
 16 prolific dispersers. Dispersal is hard-wired into their basic biology and, by the age of three, most
 17 wolves will have dispersed from their birth pack. AR_404. Because wolves have a remarkable
 18 ability to disperse, detect social openings, and find mates, they readily form widespread and
 19 well-distributed populations. AR_404; *see also* AR_25325 (Jimenez et al., 2017).

20 2. Gray wolf status and distribution in the United States

21 Except for targeted eradication programs that use a combination of poison, unregulated
 22 trapping and shooting, and other species-extermination actions, the adaptability of gray wolves
 23 allows them to respond and recover from nearly any threat. AR_407-408; AR_48. Government-
 24 sponsored eradication programs in the late 1800s and early 1900s decimated gray wolf

25
 26 ⁴ The NRM wolves are part of the Western United States metapopulation, which consists of core
 27 populations occupying vast areas of suitable wolf habitat in Montana, Idaho, and Wyoming, as
 28 well as peripheral habitats in Washington and Oregon. AR_425. Individuals from the NRM
 population have begun to recolonize California and have dispersed into Colorado and Utah.
 AR_115, 416.

1 populations in the United States. Gray wolves were essentially eliminated from the western
 2 United States by the 1930s and persisted only in remote northeastern Minnesota through the
 3 1960s. AR_407-409.

4 Beginning in the late 1960s, the Service began protecting gray wolves under the
 5 predecessor statute to the ESA, and then under the ESA following its passage in 1973. *See*
 6 *generally* AR_40-41 (Table 1). In 1978, the Service revised the gray wolf listing from multiple
 7 subspecies entities to two entities: threatened in Minnesota and endangered throughout the
 8 remaining 48 coterminous United States and Mexico. *See* Final Rule, 43 Fed. Reg. 9,607 (Mar.
 9 9, 1978).⁵ The two entities included large areas where wolves were extirpated and areas outside
 10 the species' historical range. AR_42.

11 With ESA protections, gray wolf populations rapidly expanded in the lower 48 States. In
 12 the NRM, the Service reintroduced gray wolves into central Idaho and Yellowstone National
 13 Park in the mid-1990s, AR_412,⁶ and the populations flourished, soon achieving the objectives
 14 in the NRM recovery plans, AR_44339 (1980 recovery plan); AR_44038 (1987 recovery plan).
 15 From 101 wolves in 1995, the NRM population grew to a conservative minimum population
 16 estimate of 663 wolves distributed throughout Idaho, Montana, and Wyoming by the end of
 17 2002. AR_412. By the end of 2015, the final year of a combined NRM population estimate that
 18 was part of the post-delisting monitoring for Idaho and Montana, the population reached a
 19 minimum estimated size of 1,704 wolves. *Id.* Idaho, Montana, and Wyoming have since
 20 transitioned to using different estimation techniques, but they estimated well over 2,000 wolves
 21 in the three States by the end of 2019. AR_413. This increase occurred despite the delisting of
 22 the NRM wolves in 2011 and resulting increase in human-caused mortality. Wolves also
 23 expanded outward from the NRM. The Service estimates that Oregon and Washington contained

24 _____
 25 ⁵ The 1978 rule predated the November 1978 amendments to the Act revising the definition of
 "species" to include DPSs of vertebrate fish or wildlife. AR_42.

26 ⁶ With the reintroductions, the Service designated two nonessential experimental populations
 27 under Section 10(j) of the ESA, 16 U.S.C. § 1539(j). The 10(j) rules provided for increased
 28 management flexibility to address potential human-wolf conflicts in these areas. *See* 59 Fed.
 Reg. 60,252 (Nov. 22, 1994) (Greater Yellowstone ecosystem recovery area); 59 Fed. Reg.
 60,266 (Nov. 22, 1994) (central Idaho recovery area).

1 over 300 wolves by the end of 2019 and, by 2020, wolves had dispersed to and formed packs in
2 California and Colorado. AR_414-416.

3 In the Great Lakes region,⁷ researchers estimated about 1,000 to 1,200 wolves in northern
4 Minnesota by the mid-1970s. AR_417. As in the NRM, the Great Lakes wolves expanded with
5 ESA protections. In Minnesota, the wolf population expanded its range by nearly 300% and
6 population numbers have ranged between 2,000 and over 3,000 wolves since the early 2000s. *Id.*
7 Wolves naturally reoccupied Wisconsin in the mid-1970s and Michigan in the late 1980s.
8 AR_418-420. In Wisconsin, five packs in 1979 ballooned to over 800 wolves by 2013 and
9 remained at over 900 wolves by 2019. AR_419-420. In Michigan, three wolves in 1988
10 expanded to 116 wolves in 1996, 557 wolves in 2010, and over 690 wolves by 2020. AR_420-
11 421. Minnesota, Wisconsin, and Michigan now regularly contain over 4,000 wolves. AR_424.

12 Today, the gray wolf exists within the lower 48 States in two stable or growing
13 metapopulations in the NRM and Great Lakes regions, as well as a separate Mexican wolf
14 subspecies listed in the southwest. AR_424; AR_45 (identifying separate listing of the Mexican
15 wolf subspecies). And wolves have continued to disperse widely, which “suggests that gray
16 wolves could eventually recolonize most large patches of suitable habitat [in the lower 48 States]
17 as long as healthy core wolf populations are maintained” in the NRM and Great Lakes regions.
18 AR_425. These large metapopulations represent the southern extension of vast gray wolf
19 populations in North America. The Great Lakes wolves are connected to 12,000 to 14,000
20 wolves in Canada, AR_424, and the NRM wolves are connected to over 15,000 wolves in
21 Canada, AR_425. Combined, gray wolves constitute a resilient, adaptable, and robust species
22 that exists in large and healthy numbers throughout North America.

23 **3. Recent regulatory processes**

24 **a. The 1978 Listing Rule**

25 In 1978, the Service listed gray wolves in two areas: in Minnesota (threatened), and in the
26 remaining lower 48 States and Mexico (endangered). 43 Fed. Reg. 9,607. At the time, the

27 ⁷ The Great Lakes region consists of core wolf populations and suitable habitat in Minnesota,
28 Wisconsin, and Michigan. AR_423.

1 Service gave the “firmest assurance” that it did not list the species throughout the entire lower 48
 2 States and Mexico in order to reestablish wolves in all of these geographic areas. *Id.* at 9607,
 3 9610. The Service stated the opposite: it would continue to manage and focus recovery actions
 4 on extant populations inhabiting specific geographic areas like the NRM. *Id.*

5 **b. Recovery of NRM and Great Lakes metapopulations**

6 After 1978, the Service thus developed plans to recover wolves in specific geographic
 7 areas: the NRM region, the Eastern United States (including the Great Lakes region), and the
 8 southwestern United States (Mexican wolves). AR_39-40. In the southwestern United States, the
 9 Service designated an endangered Mexican wolf subspecies in 2015 and now manages this
 10 subspecies separately from other gray wolves in the lower 48 States. AR_410.

11 For the other two geographic areas, the Service’s recovery approach worked as intended.
 12 By the mid-2000s, gray wolf populations greatly exceeded established recovery goals and
 13 criteria in both the NRM and Great Lakes regions. AR_412-21. The Service therefore began
 14 regulatory efforts to remove ESA protections for these two distinct population segments (DPS)⁸
 15 and return management to the States. The Service’s regulatory actions were controversial. States,
 16 non-governmental organizations, and individuals repeatedly filed lawsuits arguing that the
 17 Service’s regulatory actions were unlawful, either for removing ESA protections or for retaining
 18 them. *See* AR_40-41 (Table 1, listing regulatory actions and litigation history since 1967). By
 19 2019, decades of regulatory, judicial, and congressional actions resulted in a patchwork of legal
 20 protections applied to gray wolves in the lower 48 States. *Id.*

21 In the NRM, the Service designated a DPS, determined that gray wolves in the NRM,
 22 except in Wyoming, were recovered, and removed ESA protections for the recovered wolves. 74
 23 Fed. Reg. 15,123 (Apr. 2, 2009).⁹ A court vacated the rule but, in 2011, Congress mandated that
 24 the Service republish the 2009 delisting rule. 76 Fed. Reg. 25,590 (May 5, 2011) (reinstating the

25 _____
 26 ⁸ The ESA defines “species” as a species, a subspecies, or a “distinct population segment of any
 species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16).

27 ⁹ In 2008, the Service issued a rule delisting the NRM DPS in its entirety, including Wyoming.
 28 73 Fed. Reg. 10514 (Feb. 27, 2008). The rule was enjoined and later vacated and, on December
 11, 2008, the Service issued a rule reinstating ESA protections for the NRM DPS. AR_41.

2009 Rule as directed by Congress in the 2011 Continuing Appropriations Act, P.L. 112-10). In 2012, the Service removed ESA protections for wolves in Wyoming. 77 Fed. Reg. 55,530 (Sept. 10, 2012). A lower court vacated that delisting rule, but the D.C. Circuit reversed. *Defenders of Wildlife v. Zinke*, 849 F.3d 1077 (D.C. Cir. 2017); 82 Fed. Reg. 20,284 (May 1, 2017) (reinstating the 2012 Rule).

In the Great Lakes region, the Service identified a western Great Lakes DPS of wolves and determined that they were recovered. 76 Fed. Reg. 81,666 (Dec. 28, 2011). A lower court vacated the 2011 Rule and the D.C. Circuit upheld the lower court’s ruling. *Humane Soc’y of the United States v. Zinke*, 865 F.3d 585, 601-03 (D.C. Cir. 2017) (holding that the Service cannot restrict its analysis to the DPS, but must also consider the status and legal protections of listed wolves throughout the lower 48 States).

c. The Service’s recent regulatory actions addressing gray wolves in the lower 48 States

By 2019, several regulatory, judicial, and congressional actions had permanently altered the “lower 48 listing” contained in the Service’s 1978 Rule. First, the Service’s 2009 Rule and Congress’ reinstatement of it in 2011 removed NRM DPS wolves, except in Wyoming, from the scope of the 1978 Rule. Second, the Service’s 2012 Rule removing ESA protections for Wyoming wolves, upheld on appeal, removed those wolves from the scope of the 1978 Rule. Third, the Service’s 2015 Rule designating a Mexican wolf subspecies removed wolves in the southwestern United States and Mexico from the scope of the 1978 Rule. Thus, by 2019, the ESA’s lists designated wolves as threatened in Minnesota and endangered in the 44-State entity—those portions of the lower 48 States outside of: (a) the delisted NRM DPS; and (b) the range of the Mexican wolf subspecies. AR_40.

i. The 2019 Proposed Rule

Because Congress did not intend the ESA to haphazardly provide a patchwork of protections to pockets of gray wolves in portions of the lower 48 States, the Service proposed to delist the two gray wolf “entities” that remained listed in 2019—the Minnesota wolves

(threatened) and the 44-State entity (endangered). *See* AR_20097.¹⁰ The Service’s proposed rule considered the two listed entities as a single “gray wolf entity” because neither the Minnesota entity nor the 44-State entity constituted a separately protectable “species.” AR_20102.¹¹

The Service noted that the extant population in the combined entity—primarily wolves in the Great Lakes region—occupies a fraction of the gray wolf’s historically occupied range in the lower 48 States. AR_20131. But the extant population exists in a metapopulation (a series of semi-connected subpopulations) comprised of large numbers of wolves well-distributed throughout vast areas of suitable habitat. AR_20131-32. The Service found that State regulation of human-caused mortality—the primary factor affecting the long-term survival of gray wolves—was sufficiently protective and adaptable to maintain large, robust, distributed gray wolf populations into the foreseeable future. AR_20132-33. The Service proposed to remove ESA protections for the gray wolves in the lower 48 States, outside the range of the NRM DPS and Mexican wolf subspecies, because the combined entity was recovered. AR_20135.

ii. Public Comment and Peer Review

The Service provided 120 days of public comment and conducted a public hearing in Brainerd, Minnesota. AR_40; *see also* AR_20097; AR_10936, AR_19674. The Service also subjected the 2019 Proposed Rule to rigorous peer review. AR_11201; AR_10956.

Several reviewers concluded that the Service’s technical and scientific analysis was sound. AR_11068 (the Service provided “adequate review and analysis of the factors relating to

¹⁰ The Service proposed to remove ESA protections throughout the lower 48 States in 2013. 78 Fed. Reg. 35,664 (June 13, 2013). The Service issued the proposed rule after it delisted wolves in the NRM and western Great Lakes, and the proposed rule thus addressed only wolves outside the DPSs’ boundaries. *Id.* The Service also proposed to designate a Mexican wolf subspecies in the southwestern United States as endangered. *Id.* The Service finalized the proposed rule for the Mexican wolf subspecies, designating it as an endangered species. 80 Fed. Reg. 2,488 (Jan. 16, 2015). The Service superseded the rest of the 2013 proposed rule with the 2019 Proposed Rule.

¹¹ A DPS must be discrete from other population segments of, and significant to, the species to which it belongs. 61 Fed. Reg. 4,725 (Feb. 7, 1996) (DPS Policy); *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (granting *Chevron* deference to the Service’s DPS Policy). Because Minnesota wolves were not discrete from wolves in the rest of the lower 44 States, the Service determined that neither entity constituted a separate DPS, and so it combined the entities for its analysis. AR_20102.

the persistence of gray wolves in the lower 48 states”); AR_11076 (the Service’s biological analysis was “generally accurate,” with some topics that required further input); AR_11120 (in the Great Lakes “habitat is fairly secure, and not likely to drastically change in the foreseeable future, and have [*sic*] been demonstrated to support viable wolf populations” and “there is no reason to assume genetic, interconnectedness, ecological functioning or viability will be altered” for Great Lakes wolves after delisting); AR_11120-21 (“Although delisting has resulted in some decline and stabilizing of wolf populations in the [NRM] ..., the original introduced wolf population continues to serve as a source for wolves spreading throughout the region. This population will likely continue to spread and expand as long as large blocks of suitable habitat exists within range of dispersing wolves”); AR_11195 (“it is reasonable for the Service to conclude that the approach of Michigan, Wisconsin, and Minnesota to wolf management is likely to maintain a viable wolf population in the Western Great Lakes area into the future”).

Some peer reviewers, however, concluded that the Service did not adequately show that future threats would not arise, for example, by rebutting theories about how State management or genetics could become threats to wolf populations at some point in the future. AR_11151, 11154 (arguing the Service should not assume responsible State management); AR_11144 (arguing the Service’s burden is to prove that no threats will arise, rather than identify evidence of existing threats); AR_14656 (the Service’s burden is to rebut theories of possible future genetic threats, rather than identify evidence showing genetic threats exist). And peer reviewers expressed generalized concerns with the impacts of delisting on wolves located outside the NRM and Great Lakes metapopulations, like wolves in the West Coast States and in unoccupied areas of their historical range. AR_11082-83, 11090-91.¹²

In finalizing the proposed rule in 2020, the Service addressed and responded to peer reviewers’ comments by revising the final rule and biological report as appropriate and responding to specific comments. *See generally* AR_104-123.

¹² Two peer reviewers also commented extensively on their policy and legal views on ESA implementation—for example, commenting that the Service should discourage management actions that kill wolves “regardless if it has no effect on the viability of wolf populations.” AR_11148; *see also, e.g.*, AR_11082-83 (commenting with legal interpretations and opinions).

1 **iii. The 2020 Final Rule**

2 On November 3, 2020, the Service issued a Final Rule that removed regulatory
 3 protections for the two prior listed entities—the Minnesota entity and the 44-State entity. AR_38.
 4 The Service first concluded that neither entity constitutes an entire protectable “species” as
 5 Congress defined the term and that the Service could not lawfully protect these entities
 6 prospectively as separate endangered or threatened species. AR_43-44. The Service also decided
 7 to review the “status of gray wolves in several configurations . . . to eliminate the possibility of
 8 removing protections for any gray wolves that might meet the Act’s definition of a species and
 9 might be endangered or threatened.” AR_44. The Service thus considered the status of and
 10 threats to wolves in three configurations comprising four entities: “(1) Each of the two currently
 11 listed gray wolf entities separately; (2) the two currently listed entities combined into a single
 12 entity (the approach in our proposed rule); and (3) a single gray wolf entity that includes all gray
 13 wolves in the lower 48 [United States] and Mexico except for the Mexican wolf.” *Id.*

14 To begin, the Service properly framed the inquiry as addressing whether wolf populations
 15 in the lower 48 States can sustain themselves over time, which necessitates a sufficient number
 16 and distribution of healthy populations to withstand annual variations in the environment,
 17 catastrophes, and novel changes in biological and physical environments. AR_50-52. A species
 18 with a sufficient number and distribution of healthy populations is more able to tolerate stresses
 19 and adapt to environmental changes. AR_140. And metapopulations “are widely recognized as
 20 being more secure over the long term than are several isolated populations that contain the same
 21 total number of packs and individuals.” *Id.* Applying these biological principles, the Service
 22 found that gray wolves in the lower 48 States are anchored by two large metapopulations in the
 23 NRM and Great Lakes regions. AR_150. While these metapopulations occupy a fraction of their
 24 historical range, AR_47-48, the Service concluded they are capable of sustaining viable wolf
 25 populations in the lower 48 States over time, AR_124, 140-153. Several lines of evidence
 26 support the Service’s findings.

1 First, the metapopulations contain abundant numbers of gray wolves. Combined, the two
2 metapopulations contain over 6,000 wolves that are part of connected wolf populations totaling
3 over 30,000 animals. *Id.*

4 Second, the metapopulations contain populations broadly distributed across six States
5 that are expanding outward. *Id.* As noted, metapopulations are much more secure than a series of
6 isolated populations because adverse effects experienced by one subpopulation can be countered
7 by influxes of individuals from other subpopulations. AR_43.

8 Third, the metapopulations occupy high-quality habitats that support—and, based on
9 ample evidence, will continue to support—abundant prey resources into the future. AR_75-78.
10 States have incentives to manage deer, elk, and other game animals in abundant, harvestable
11 quantities, providing prey security into the future. *See, e.g., AR_75-76, Defenders of Wildlife,*
12 *849 F.3d at 1084* (upholding the Service’s analysis of State management actions when also
13 considering the “strength of the State’s incentives”).

14 Fourth, the metapopulations have high genetic fitness and, through remarkable dispersal
15 propensity and ability, readily can maintain that fitness across variable environmental conditions.
16 AR_102-03, 140, 146. And gray wolves are genetically connected to many thousands of wolves
17 in Canada, further guarding against future deleterious genetic impacts. AR_146, 150.

18 Fifth, individual States manage mortality and prey species as if they were isolated
19 populations; they do not rely on other States to sustain either wolf or prey resources into the
20 future. AR_102-03. Multiple States agreeing to and managing above minimum recovery levels
21 provides management redundancy. If one State’s wolf population periodically falls for whatever
22 reason—disease, State management changes, and so on—management by other States to sustain
23 populations above minimum levels provides a buffer and continued healthy populations of
24 wolves to recolonize vacant habitats. AR_140, 142, 149.

25 Sixth, management within individual States provided assurances that wolf populations
26 are maintained above minimum thresholds. The evidence shows that only high levels of
27 sustained human-caused mortality can threaten to reduce wolf populations. AR_57; AR_405,
28 419-20. Thus, it is not crucial to maintain human-caused mortality at defined thresholds because,

1 even if hunting or other events cause declines, wolf populations rapidly recover when the
 2 human-caused mortality levels drop. *Id.* Thus, regulatory systems must regulate and manage
 3 human-caused mortality, but need not precisely control individual wolf mortality, particularly
 4 when they contain robust monitoring requirements and provide for adaptive management.
 5 AR_54-55.¹³ Through post-delisting monitoring, the Service will evaluate population numbers
 6 and other data to verify that gray wolves remain secure under State management. AR_154. At
 7 the time of the 2020 Rule, the Service concluded, based on the best available science, that
 8 existing regulatory mechanisms were sufficient to maintain gray wolf recovery within the
 9 various wolf entities that it evaluated. AR_102-03.

10 In short, the Service concluded that gray wolves in the United States exist in robust, well-
 11 distributed, and expanding metapopulations occupying core habitats in the NRM and Great
 12 Lakes regions. The Service arrived at this conclusion in part because gray wolves continue to
 13 recolonize vacant, suitable habitat in the West Coast States, Colorado, and elsewhere. The active
 14 and ongoing recolonization is evidence of recovery. Despite delisting in the NRM States
 15 resulting in fewer protections than the ESA—often much less, as in Wyoming’s shoot-on-sight
 16 predator zone, AR_63—robust gray wolf populations continue to grow and recolonize adjacent
 17 habitats in the West Coast States and southern Rocky Mountains. AR_72-73, 133-34, 152-53.
 18 The Service removed ESA protections for the Minnesota and the 44-State entities in part
 19 because, based on regulatory mechanisms that existed in 2020, gray wolves in the lower 48
 20 States are biologically capable of sustaining robust, connected populations. AR_38, 153-54.

21 **III. STANDARD OF REVIEW**

22 Judicial review of agency determinations under the ESA is governed by the “arbitrary or
 23 capricious” standard in the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A). *See*
 24 *Trout Unlimited v. Lohn*, 559 F.3d 946, 955 (9th Cir. 2009). Under the APA, the “narrow” role

25
 26 ¹³ Michigan, for example, admits that it has the tools and capabilities to manage responsibly gray
 27 wolves, reinforcing the Service’s findings. ECF 83-2 at 2. In attacking management by other
 28 States, Michigan goes beyond its area of expertise and provides no evidence to support its view
 that the Service rationally analyzed Michigan’s regulatory mechanisms, but irrationally
 considered other State regulatory regimes.

of a court is to ensure that the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.” *Motor Vehicle Mfrs. Ass’n. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). When an agency is acting within its area of expertise, the courts are at their “most deferential.” *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc). Expert predictive judgments are “entitled to particularly deferential review.” *Trout Unlimited*, 559 F.3d at 959. As a result, a “court is not to substitute its judgment for that of the agency,” and it should uphold an agency decision of “less than ideal clarity” so long as “the agency’s path may reasonably be discerned.” *FCC v. Fox Television Stations*, 556 U.S. 502, 513-14 (2009) (citations omitted).

IV. ARGUMENT

When the Service acts to delist an “iconic” species, it “raises a host of scientific, political, and philosophical questions regarding the complex relationship between” the species and humans. *Greater Yellowstone Coal. v. Servheen*, 665 F.3d 1015, 1019 (9th Cir. 2011). The Court’s role, however, is not to “grapple with” those questions or to “resolve scientific uncertainties or ascertain policy preferences.” *Id.* The Court instead must “address only those issues [it is] expressly called upon to decide pertaining to the legality of the Service’s delisting decision.” *Id.* In considering those issues, the Court should assume that the agency’s decision is lawful unless the plaintiff proves otherwise. “Absent a showing of arbitrary action, we must assume that the agencies have exercised this discretion appropriately.” *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976).

Here, gray wolves listed before 2020 did not meet the statutory definition of a “species,” which precludes their protection as a “threatened species” or “endangered species” under the ESA. The Service’s regulatory action is proper on this basis alone. The Service, however, proceeded cautiously in the 2020 Rule and further “consider[ed] whether any populations of gray wolves covered by the listed entities meet the definition of a threatened species or an endangered species.” AR_44. The Service did so by grounding its comprehensive review in the best available scientific data, as informed by the Service’s decades of experience and expertise gained in managing and recovering wolves. The Service’s determinations comply with the law.

A. The Service properly removed ESA protections for the gray wolves previously listed as threatened or endangered in the lower 48 States.

Plaintiffs devote much of their brief to criticizing how the Service reviewed the biological or recovered status of gray wolves in the lower 48 States. Pls. Br. at 10-41 (ECF 74 in 21-cv-344-JSW). Based on these arguments, they want the Court to order the Service to relist the previously listed gray wolf entities—the Minnesota and the 44-State entities. *Id.* at 47-49. But Plaintiffs (and amici) leap over the first question the Service must answer in every listing or delisting inquiry:

Did the ESA-listed gray wolf entities the Service reviewed in the 2020 Rule constitute protectable “species” under the ESA?

Each complaint acknowledges this threshold question, even if in conflicting ways.¹⁴ Plaintiffs now avoid the question, waiving any claim that the Service’s decision is unreasonable. For good reason. The ESA’s plain language, the Service’s binding policies, and Ninth Circuit precedent compelled the Service to conclude that the Minnesota and 44-State entities are not separate protectable “species” under the ESA. Without a valid protectable “species,” the Service had no choice: through rulemaking, it could not legally maintain endangered or threatened species’ protections for them.

1. The ESA requires the Service to first identify a valid “species” capable of being protected as threatened or endangered.

The ESA has a singular focus—the conservation of “species.” Congress defined “species,” 16 U.S.C. § 1532(16), provided the Service with regulatory authority to designate a “species” as threatened or endangered, *id.* § 1533(a)(1), and structured the remaining portions of the ESA to serve the goal of conserving such threatened or endangered “species.” *See, e.g.*, 16 U.S.C. § 1531(b); *see also, e.g.*, 16 U.S.C. §§ 1533(f)(1), 1536(a), 1538, 1539. Proper

¹⁴ Defenders of Wildlife and WildEarth Guardians, for example, alleged that the Minnesota and 44-State entities constitute “species” as defined under the ESA. ECF 54 ¶¶ 38, 42 (21-cv-344); ECF 79 ¶¶ 128-149 (21-cv-349). NRDC contradictorily admitted that neither entity constitutes a “species.” ECF 51 ¶ 110 (21-cv-561). While telling, these inconsistencies are not relevant because Plaintiffs waived the claims by not presenting them on summary judgment. *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (“We review only issues which are argued specifically and distinctly in a party’s opening brief.”) (citation omitted).

1 administration of the ESA thus depends on the Service appropriately undertaking the first step in
 2 every listing or delisting inquiry—the “‘neutral’ task of defining a species.” *Trout Unlimited*,
 3 559 F.3d at 955.

4 “Species” is a term of art. It includes taxonomic species and subspecies, as well as “any
 5 distinct population segment of any species of vertebrate fish or wildlife which interbreeds when
 6 mature.” 16 U.S.C. § 1532(16). The Service relies on standard taxonomic distinctions to identify
 7 species and subspecies. 50 C.F.R. § 424.11(a). Congress did not define the term DPS, and so the
 8 Service and the National Marine Fisheries Service (NMFS) promulgated a joint DPS Policy in
 9 1996. 61 Fed. Reg. 4,722. Under the DPS Policy, the Service defines a population segment as a
 10 DPS based on considerations of the population’s discreteness from other populations and its
 11 significance to the taxon to which it belongs. *Id.* The DPS Policy constitutes a reasoned
 12 interpretation of the ESA. *Nw. Ecosystem All.*, 475 F.3d at 1150 (DPS Policy entitled to
 13 deference under *Chevron USA, v. Nat. Res. Def. Council*, 467 U.S. 837, 865 (1984)).

14 The ESA’s definition of “species” allows the Service to list or delist only *entire*
 15 “species”; it prohibits the Service from classifying something other than a “species” as
 16 threatened or endangered.¹⁵ In Senate Report No. 96-151 (May 15, 1979), discussed in the DPS
 17 Policy, 61 Fed. Reg. at 4,725, the Senate Committee rejected pleas to remove the Service’s
 18 authority to designate DPSs because that authority could lead to the listing of “squirrels in a
 19 specific city park” even though an abundance of squirrels lived in “other parts in the same city,
 20 or elsewhere.” *Id.* at 6-7. The Committee equated protecting squirrels in a city park with an
 21 abuse of the DPS concept, not a proper application of it. *Id.* at 7. That is, Congress did not intend
 22 for the Service to protect a haphazard grouping of animals as threatened or endangered. *Id.*

23 Ninth Circuit precedent recognizes the same limitations. In *Trout Unlimited*, the court
 24 held that the Service cannot use extraneous considerations—like differences between hatchery
 25 and wild fish of the same species—to justify listing an entity that does not comprise an entire

26 ¹⁵ Although not applicable to this case, the Service may list a taxon of higher rank than a species.
 27 50 C.F.R. § 424.11(a). This distinction is one of convenience, not substance, because the Service
 28 can list a higher taxon only if “all included species are individually found to be endangered or
 threatened.” *Id.*

species, subspecies, or DPS. 559 F.3d at 955-56; *see also* *Alsea Valley All. v. Evans*, 161 F. Supp. 2d 1154, 1162 (D. Or. 2001) (agency not permitted to split a single species into two entities for listing purposes). In *Defenders of Wildlife v. Salazar*, 729 F. Supp. 2d 1207 (D. Mont. 2010), the Court similarly rejected the Service’s efforts to protect as threatened or endangered only part of a broader “species,” like Wyoming wolves. *Id.* at 1216-17.

The courts held that, rather than manipulate the ESA’s definition of “species” to serve policy ends, the Service must identify the “species” as it is—a “neutral” task—and *then* conduct an endangerment analysis for the entire species. *Trout Unlimited*, 559 F.3d 955; *Ctr. for Biological Diversity v. Zinke*, 868 F.3d 1054, 1058 (9th Cir. 2017) (“If a population is found to be a DPS, the inquiry proceeds to whether it is endangered or threatened”); *see also* 61 Fed. Reg. at 4,725 (if the Service identifies a DPS, it *then* conducts a status review).¹⁶

2. The Service properly determined that the Minnesota and 44-State entities are not protectable “species” under the ESA.

In 1978, the Service designated gray wolves as a threatened species in Minnesota and as an endangered species in the remaining portions of the lower 48 States and Mexico. 43 Fed Reg. at 9,607, 9,610. This 1978 listing pre-dated amendments to the ESA allowing the Service to list and protect DPSs, and so the 1978 listing did not conform to the ESA as written today. The Service recognized this disconnect and made several attempts over the years to address wolves consistent with the statutory structure. AR_40-41 (rulemaking to designate DPSs and remove ESA protections for these DPSs because gray wolves recovered in the NRM and Great Lakes by the early-to-mid 2000s). The courts overturned and vacated many of the prior rules, AR_40-41, often leading to a “confused state of affairs,” *Wyoming v. U.S. Dep’t of Interior*, No. 09-CV-

¹⁶ The Service revised the listing regulations in 2019 to include 50 C.F.R. § 424.11(e)(3), which recognizes the same concept: the Service cannot maintain protections for an entity that does “not meet the statutory definition of a species.” The 2019 regulation did not substantively depart from prior regulations. 50 C.F.R. § 424.11(d)(3) (1986) (providing for revisions to listings when the data justifying an original listing—such as its composition as a species—was erroneous). Plaintiffs’ complaints challenge the Service’s reliance on the 2019 Regulation, *see, e.g.*, ECF 79 ¶ 149 (21-cv-349), but they waived the claims by not raising them on summary judgment, *supra* n.14. Even if Plaintiffs had pursued the argument, it would fail because the regulation applies the ESA’s plain language: the Service lacks authority to protect something other than a “species.”

1 118J, 2010 WL 4814950, at *38 (D. Wyo. Nov. 18, 2010).¹⁷ Moreover, for more than a decade,
 2 the 1978 entities themselves have not existed as they originally appeared on the ESA's list. In
 3 response to one of the adverse court decisions, Congress itself extracted the NRM population
 4 segment, except for Wyoming, from the 1978 listing, and the Service later carved out Wyoming
 5 and the Mexican wolf subspecies from the prior 1978 listed entities. *See* AR_40-41; *see also*
 6 AR_4211 (Plaintiffs admitting prior regulatory actions "carved" up the 1978 listing). By 2020,
 7 ESA-listed wolves thus existed in two entities: Minnesota and the 44-State entity. *Id.* In the 2020
 8 Rule, the Service appropriately evaluated whether these remaining entities constitute protectable
 9 "species" within the meaning of the ESA. The answer was no.

10 First, neither entity constitutes an entire taxonomic species because gray wolves are
 11 widely distributed across the globe. AR_43. Nor does either entity constitute an entire taxonomic
 12 subspecies, unlike the Mexican wolves. *Id.* Finally, neither entity constitutes a DPS. Under the
 13 Service's DPS Policy, a DPS must be both discrete from other populations of the species and
 14 significant to the taxon to which it belongs. 61 Fed. Reg. at 4,725. To be discrete, the population
 15 segment must be markedly separate from other members of the species because of "physical,
 16 physiological, ecological, or behavioral factors." *Id.* Minnesota wolves are spatially, biologically,
 17 and genetically connected to wolves in Wisconsin, Michigan, and surrounding States and are
 18 thus not distinct from the 44-State entity. AR_43. Likewise, the 44-State entity is not a DPS
 19 because it includes wolves connected to other wolves in both Minnesota and the NRM region.
 20 AR_43-44. The Service may consider whether any DPSs of gray wolves may warrant listing
 21 under the DPS Policy's criteria, but neither the 44-State entity nor the Minnesota entity meet
 22 those criteria.

23 Plaintiffs agree that the ESA's inquiry depends on the upfront, proper identification of the
 24 "species." Pls. Br. at 10 (arguing the Service must properly determine whether any "species")

25
 26 ¹⁷ As *Wyoming* observed: "Given the past history of the wolf project, both the state of Wyoming
 27 and the FWS have been facing conflicting rulings and determinations, based on substantially the
 28 same scientific and commercial data—a Catch-22 for all. The courts have done little to facilitate
 resolution of the issues and an understanding as to what is necessary to satisfy the requirements
 of the ESA's delisting provisions in the unique facts of this case." 2010 WL 4814950, at *38.

exists and prohibits “artificially” creating “species” for listing or delisting purposes). Despite raising claims in the complaints over whether the Minnesota and 44-State entities constitute a protectable “species,” Plaintiffs abandoned those claims. *See* n.14, *supra*. Plaintiffs therefore do not contest the Service’s determination that neither listed entity constitutes a protectable species under the ESA.

Considering the law and the Service’s uncontested finding, the Court confronts a straightforward situation. The Service engaged in rulemaking to address the status of gray wolves in the lower 48 States. *Coos Cnty. Bd. of Cnty. Comm’rs v. Kemthorne*, 531 F.3d 792, 804 (9th Cir. 2008) (the Service may start rulemaking in response to a petition or on its own initiative). When completing a rulemaking, the Service must conform its decision to the ESA’s requirements. 5 U.S.C. § 706(2)(C) (an agency’s final actions must not be “in excess of statutory jurisdiction, authority, or limitation, or short of statutory right”); *Defs. of Wildlife v. Norton*, 258 F.3d 1136, 1146 (9th Cir. 2001) (even decisions to withdraw proposed rules are final and must comply with the ESA). The ESA precludes the Service from recognizing something other than a “species” as threatened or endangered—an important factor because an ESA listing preempts States and Tribes from exercising their sovereign rights over resident wildlife species. *Strahan v. Cox*, 127 F.3d 155, 167–68 (1st Cir. 1997) (ESA preempts inconsistent State regulatory schemes).¹⁸ And here, neither listed entity constitutes a separate “species.” The Service therefore could not maintain ESA protections for the two entities and properly delisted them. AR_153-54.

Rather than address the plain language and import of the ESA, Plaintiffs deflect by questioning the Service’s discretionary consideration of the *status* of gray wolves and arguing that it should have listed *other* wolf entities. Neither argument undercuts the 2020 Rule.

a. The Service’s review of the *status* of gray wolf entities is not legally relevant to the regulatory action taken.

Plaintiffs’ main complaint about the 2020 Rule focuses on the Service’s review of the status of wolves in the lower 48 States. *See* Pls. Br. at 18-41. As noted, the Service concluded

¹⁸ *See* ECF 83-2 (“All gray wolves found within Michigan are ‘the property’ of the People of the State of Michigan. Mich. Comp. Laws § 324.40105.”).

1 that the Minnesota and the 44-State entities are not protectable “species” within the meaning of
 2 the ESA and should be removed from the ESA’s lists. The Service could have stopped its
 3 analysis there and considered in a separate, later action, either on its own initiative or in response
 4 to a petition, whether to list or protect other gray wolf “species,” like any regional DPSs. An
 5 “agency need not solve every problem before it in the same proceeding.” *Mobil Oil Expl. &*
 6 *Producing Se. v. United Distrib. Cos.*, 498 U.S. 211, 230-31 (1991) (agency “enjoys broad
 7 discretion in determining how best to handle related, yet discrete, issues in terms of [both]
 8 procedures and priorities”) (citations omitted); *see also E. & J. Gallo Winery v. EnCana Corp.*,
 9 503 F.3d 1027, 1039 (9th Cir. 2007) (agency has “wide latitude to determine the most effective
 10 way to carry out its charge from Congress”). Yet the Service took a precautionary approach to
 11 administering the ESA and also considered whether other populations or configurations of gray
 12 wolves covered by the previously listed Minnesota and 44-State entities met the definition of a
 13 threatened species or an endangered species. AR_44 (“in recognition of the unique listing history
 14 of the gray wolf, our many prior actions to designate and delist DPSs (table 1), and related court
 15 opinions, we have adopted a conservative approach to delisting in this rule”).

16 In the 2020 Rule, the Service analyzed the status of gray wolves in four configurations:
 17 (1) Minnesota; (2) the 44-State entity; (3) Minnesota and the 44-State entity combined; and (4)
 18 wolves in the lower 48 States, excluding Mexican wolves. AR_44-45. The Service reasonably
 19 examined the consequences of the delisting to ensure that other potential configurations of
 20 wolves that might qualify as listable “species” within the meaning of the ESA do not require
 21 protection when it removed protections for the Minnesota and 44-State entities. *Id.* But that
 22 analysis is legally irrelevant to whether the then-existing listed entities were consistent with the
 23 ESA. The Service could not maintain protections for the Minnesota or 44-State wolves based on
 24 the status of other gray wolf configurations, and so its discretionary status review of alternative
 25 wolf entities does not undermine its delisting decision.

26 *Center for Biological Diversity v. Jewell*, 12-cv-2296, 2014 WL 5703029 (D. Ariz. Nov.
 27 5, 2014), highlights this principle. The court there affirmed the Service’s finding that the desert
 28 eagle population under review did not constitute a “species”—there, a DPS. *Id.* at *13. Even

1 though the Service also analyzed threats to the desert eagle population, the court found the
 2 threats analysis irrelevant. The Service could not designate the desert eagle as an endangered or
 3 threatened species because of a threats analysis alone. *Id.* (without a DPS, “the Court need not
 4 reach the question of whether [the Service] acted arbitrarily and capriciously in finding the desert
 5 eagle not threatened or endangered”). Both in the district court and on appeal, the question thus
 6 centered on whether the entity the Service reviewed constituted a DPS and not on the *status* of
 7 that entity. *Id.*; *Ctr. for Biological Diversity*, 868 F.3d 1054.

8 The ESA’s plain language confirms that a status review is legally irrelevant without a
 9 protectable “species.” Under the ESA, every part of the statutory listing or delisting inquiry
 10 depends on the proper identification and existence of a protectable “species.” Section 4(a)(1), for
 11 example, requires the Service to “determine whether any species,” not unscientific wildlife
 12 groupings, constitute endangered species or threatened species. 16 U.S.C. § 1533(a)(1). The ESA
 13 requires the Service to consider five statutory factors to gauge the level of threats to a “species.”
 14 *Id.* § 1533(a)(1)(A) (the Service must consider threats to “*its* habitat or range”—i.e., the
 15 “species” habitat or range) (emphasis added). Likewise, in conducting a status review, the
 16 Service must consider threats in “a significant portion of *its* range”—i.e., the “species” range. *Id.*
 17 § 1532(6) (definition of “endangered species”) (emphasis added). In performing this review, the
 18 Service must consider State or foreign nation efforts “to protect such species.” *Id.* 1533(b)(1)(A).
 19 These examples reinforce the ESA’s two-step inquiry, where the second step—a status review—
 20 has relevance only if it addresses a “protectable” species. *Trout Unlimited*, 559 F.3d at 955. By
 21 focusing on the second step and ignoring the first, Plaintiffs address the wrong question and thus
 22 do not call into question the Service’s decision that delisting is required under the first step of the
 23 listing inquiry—the lack of a protectable species.

24 Plaintiffs’ reliance on cases evaluating prior wolf listing and delisting actions does not
 25 salvage their flawed framing of the case. Plaintiffs, for example, emphasize two district court
 26 cases addressing the Service’s 2003 Rule that reclassified the 1978 wolf listing into three
 27 DPSs—an Eastern, a Western, and a Southwestern DPS. Pls. Br. at 12 (citing and discussing
 28 *Nat’l Wildlife Fed’n v. Norton*, 386 F. Supp. 2d 553 (D. Vt. 2005), and *Defenders of Wildlife v.*

1 *Dep't of Interior*, 354 F. Supp. 2d 1156 (D. Or. 2005)). Those courts rejected the DPS
 2 classifications because the Service lumped large swaths of historical habitat into the range of
 3 extant populations, thus designating DPSs “based upon geography, not biology.” *Nat'l Wildlife*
 4 *Fed'n*, 386 F. Supp. 2d at 564; *Defenders of Wildlife*, 354 F. Supp. 2d at 1170-71. The cases that
 5 Plaintiffs cite support the Service’s decision in the 2020 Rule. The listed Minnesota and 44-State
 6 entities include areas of unoccupied habitat—New Jersey, Oklahoma, West Virginia—and
 7 represent geographic areas, not biological delineations of “species.” The Service therefore
 8 correctly concluded that the prior entities do not constitute “species” as defined by the ESA.

9 Plaintiffs’ discussion of *Humane Society*, 865 F.3d 585, and *Crow Indian Tribe v. United*
 10 *States*, 965 F.3d 662 (9th Cir. 2020), misses the mark for similar reasons. Pls. Br. at 11; *see also*
 11 ECF 83-2 at 8-9. In both cases, the Service carved out a DPS from a prior listed entity and
 12 examined only the DPS. *Humane Society*, 865 F.3d at 601-02. Both courts rejected this approach
 13 and held the Service must examine the effects of delisting a DPS on the entire listed entity. *Id.*;
 14 *Crow Indian Tribe*, 965 F.3d at 677-78. In sharp contrast, the Service here examined the entire
 15 listed entities and, even more, analyzed the status of wolves throughout the entire lower 48 States
 16 to ensure that no other wolf configurations should be protected as a threatened or endangered
 17 species concurrent with the delisting.¹⁹ In the 2020 Rule, the Service did not *create* a remnant
 18 entity that was not a protectable “species,” thereby opening a “backdoor route” to a future
 19 regulatory action—the concern addressed by *Humane Society*, 865 F.3d at 601-03. The remnant
 20 entities already existed because of prior regulatory and congressional actions, as well as actions
 21 advocated by some Plaintiffs (the 2015 Mexican wolf subspecies listing). AR_41-42.²⁰ It is one
 22 thing to find that the Service cannot *create* a statutory problem by carving up a listed entity to

23 ¹⁹ Some amici point to the court’s instruction in *Humane Society* to evaluate the entire listed
 24 entity, yet they argue the Service erred in analyzing the listed wolf entities (like the 44-State
 25 entity). ECF 86-1 at 18. This confusion over the proper unit of analysis identifies no flaw in the
 Service’s 2020 Rule.

26 ²⁰ Some Plaintiffs petitioned the Service to extract the Mexican wolf subspecies from the 1978
 27 listing and separately protect them. 80 Fed. Reg. at 2489 (discussing Center for Biological
 28 Diversity and WildEarth Guardians petitions). The Service agreed and, in 2015, designated the
 Mexican gray wolf subspecies as an endangered species. *Id.* at 2,511. This regulatory action
 modified the 1978 Rule by extracting the Mexican wolf subspecies from the 1978 listing. *Id.*

delist a DPS, as the courts concluded in *Humane Society* and *Crow Indian Tribe*. It is another thing to prohibit the Service from addressing a statutory problem that already exists—here, the lack of a “species” as Congress defined the term. *Cf. SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947) (when confronted with prior illegal action, the agency was “bound to deal with the problem afresh, performing the function delegated to it by Congress”).

Plaintiffs’ disagreement with how the Service considered the status of the wolf entities cannot paper over their failure to challenge the Service’s threshold determination that neither listed entity constitutes a valid “species” capable of being protected under the ESA.

b. Plaintiffs’ focus on whether the Service should list other “species” does not undermine the 2020 Rule.

Plaintiffs’ secondary critique alleges the Service erred in failing to identify and protect *other* species, like a Pacific Coast DPS (Pls. Br. at 13-18), or perhaps up to five separate DPSs identified in Plaintiffs’ petition (Pls. Br. at 43-46).²¹ Plaintiffs also contest the Service’s optional reviews of other wolf configurations, like wolves in the lower 48 States (Pls. Br. at 41-43). These arguments admit the relevant question is whether some *other* species exists in the lower 48 States, not whether the Service erred in the 2020 Rule by removing ESA protections for the Minnesota and 44-State entities.

First, Plaintiffs argue that the Service should have treated West Coast wolves as “discrete” from NRM wolves under the DPS Policy because, while geographically connected, the wolves are genetically distinct. Pls. Br. at 16-17 & n.13. Plaintiffs mischaracterize the Service’s analysis of West Coast wolves, as discussed below.²² And their focus on a separate

²¹ Plaintiffs refer to wolves in Washington, Oregon, and California as “Pacific Coast” wolves. The Service referred to those States as “West Coast States,” and so we use “West Coast wolves.”

²² Plaintiffs’ new petition asking the Service to list new “species” contradicts their litigation arguments. Plaintiffs argue here that West Coast wolves are biologically distinct and separate from NRM wolves. Pls. Br. at 13-18. The Center for Biological Diversity, Humane Society, and Sierra Club, however, recently petitioned the Service to list a DPS that includes both NRM and West Coast wolves. Petition at 2, 10-14, <https://ecos.fws.gov/docs/tess/petition/992.pdf>. WildEarth Guardians and others similarly argue in a new petition that the Service should list a Western DPS that includes NRM and West Coast wolves. Petition at 6, 14-16, <https://ecos.fws.gov/docs/tess/petition/3352.pdf>. These incompatible theories are unexplained, unconvincing, and arguably improper. *Cf.* 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4477, p. 782 (1981) (“Absent any good explanation, a party should not

1 DPS of West Coast wolves is problematic because the Service could not simultaneously protect
 2 both a 44-State DPS and a Pacific Coast DPS as endangered or threatened. *See* 61 Fed. Reg. at
 3 4,724-25 (a DPS must be discrete from—not part of—other populations); *Alsea Valley All.*, 161
 4 F. Supp. 2d at 1162 (“Listing distinctions below that of ... a DPS of a species are not allowed
 5 under the ESA.”). Plaintiffs’ focus on a Pacific Coast DPS thus, in essence, acknowledges that a
 6 44-State entity does not constitute a protectable DPS under the law.

7 Second, Plaintiffs have petitioned—and continue to petition—the Service to list *other*
 8 DPSs, implicitly conceding that the listed Minnesota and 44-State entities are not protectable
 9 “species.” In Plaintiffs’ 2018 petition, for example, they contended that up to five DPSs exist in
 10 the lower 48 States. Pls. Br. at 44 (discussing AR_21766). Except for international borders, DPSs
 11 are based on biology, 61 Fed. Reg. at 4,725, and so multiple overlapping DPSs cannot be listed
 12 simultaneously, even if each individual DPS theoretically could be “scientifically supported,”
 13 Pls. Br. at 44. This foundational defect highlights why the Service rationally denied the 2018
 14 petition, and the Court should reject the claim raised by the *Defenders* plaintiffs challenging that
 15 decision. Pls. Br. at 43-46.²³ But regardless of the basis for Plaintiffs’ arguments for multiple
 16 DPSs, they are *not* arguing that the Minnesota or 44-State entities are DPSs. *Id.* Plaintiffs in fact
 17
 18

19 be allowed to gain an advantage by litigating on one theory, and then seek an inconsistent
 20 advantage by pursuing an incompatible theory”).

21 ²³ While Plaintiffs argue the Service found the “petition presented substantial information on
 22 threats,” Pls. Br. at 45, the Service concluded the opposite. First, the petition did not present
 23 substantial information showing that their alternative proposing a set of five gray wolf DPSs was
 24 a valid option for revising the listed entities. AR_326-29. Second, the Service found that
 25 Plaintiffs failed to provide substantial information that listing may be warranted for: (1) a lower
 26 48 States DPS or (2) Western and Eastern United States DPSs. AR_331-47. The Service was not
 27 required to defer to Plaintiffs’ information, Pls. Br. at 45-46, where that would have required the
 28 Service to ignore information readily available in its files and its own past resolution of scientific
 evidence. *See* 50 C.F.R. § 424.14(h)(1)(iii) (like motions to reconsider judicial orders, the
 Service’s petitions findings “must be applied in light of any prior reviews or findings the Service
 has made on the listing status of the species that is the subject of the petition”); *see also Ctr. for*
Biological Diversity v. Morgenweck, 351 F. Supp. 2d 1137, 1142 (D. Colo. 2004) (“Of course
 FWS can rely on what is within its own expertise and records to reject petitions consistent with
 ESA standards.”). The Service thus properly denied the petition based on findings that Plaintiffs’
 information was either not credible or already resolved by the Service in prior rules. AR_331-46.

1 concede that “legacy problems” preclude the Service from protecting the Minnesota and 44-State
2 entities as DPSs. Pls. Br. at 44.

3 Third, Plaintiffs allege the Service procedurally erred by failing to provide the public
4 with notice that it would be analyzing a “48 United States, minus Mexican wolf” entity. Pls. Br.
5 at 41-43. The Service, however, apprised the public of the precise regulatory action taken: the
6 proposed rule sought comment on removing ESA protections for two entities (the Minnesota and
7 44-State entities), AR_20135, and the final 2020 Rule implemented *that* regulatory action,
8 AR_153-54. The additional analysis in the final rule either expanded upon issues that were
9 already discussed in the proposed rule (e.g., that neither of the listed entities constitute a
10 “species”), or responded to comments on the proposal (e.g., evaluating the status of the NRM
11 wolves). AR_103-04; *see also Rybachek v. EPA*, 904 F.2d 1276, 1287–88 (9th Cir. 1990) (“fact
12 that a final rule varies from a proposal, even substantially, does not automatically void the
13 regulations. Rather, we must determine whether the ... final rule was in character with the
14 original proposal and a logical outgrowth of the notice and comments received”).²⁴

15 Beyond that, Plaintiffs’ own position during the rulemaking was that the Service’s
16 analysis of anything besides the Minnesota and 44-State entities was legally irrelevant. *See, e.g.,*
17 AR_4206; AR_10142. And so it was. The Service’s analysis of new entities or wolf
18 configurations did not have any bearing on its threshold determination that the Minnesota and
19 44-State entities are not protectable “species” under the ESA, and the rule should be upheld on
20 that independent basis. Plaintiffs’ complaints with the adequacy of procedural notice on a
21 different issue—the status of different lower 48 States wolf entities—cannot show either harm to
22

23 ²⁴ While not legally relevant, the Service’s proposed rule fully apprised the public that it was
24 considering the status of NRM wolves. Pls. Br. at 41-43 (expressing concern with whether the
25 Service gave notice it would consider NRM wolves). The Service’s proposed rule provided
26 notice that it was considering the Biological Report, which analyzed all lower 48 States wolves.
27 *See, e.g.,* AR_20103. And the proposed rule itself analyzed NRM wolves. *Id.* at 20102, 20135
28 (addressing connection of West Coast wolves to NRM wolves); *id.* at 20110 (discussing effects
of State management of NRM wolves). Nor did the Service err in developing its analysis in
response to public comments. *See, e.g.,* AR_5972. “Agencies, are free—indeed they are
encouraged—to modify proposed rules as a result of the comments they receive.” *Ne. Md. Waste
Disposal Auth. v. EPA*, 358 F.3d 936, 951 (D.C. Cir. 2004) (per curiam).

1 them or a defect in the Service’s regulatory action. *City of Los Angeles v. U.S. Dep’t of Com.*,
 2 307 F.3d 859, 877 (9th Cir. 2002) (any procedural irregularities are harmless when “we know
 3 that the result would have been exactly the same”).

4 At bottom, Plaintiffs challenge the Service’s decision to remove regulatory protections
 5 for two entities—the Minnesota and the 44-State wolves. And Plaintiffs ask the Court to reinstate
 6 protections for those two entities. Pls. Br. at 47-49. Rather than focusing on the Service’s
 7 regulatory action, Plaintiffs’ litigation arguments are concerned with the Service’s failure to
 8 protect something new, like West Coast wolves or various DPS configurations. Even if Plaintiffs
 9 were correct that the Service erred in failing to protect something new in the 2020 Rule (and they
 10 are not), the remedy would be a remand for the Service to reconsider alternative wolf
 11 configurations—an issue already pending before the agency given Plaintiffs’ recent petitions.
 12 The remedy would *not* be to reinstate the past unlawful regulatory regime, *Crickon v. Thomas*,
 13 579 F.3d 978, 988 (9th Cir. 2009), particularly when action to reinstate prior rules could be
 14 immediately challenged as unlawful, *see, e.g., Alaska v. U.S. Dep’t of Agric.*, 772 F.3d 899, 900
 15 (D.C. Cir. 2014); *Oceana, Inc. v. Bryson*, 940 F. Supp. 2d 1029, 1045-46 (N.D. Cal. 2013); *see*
 16 *also* Pls. Br. at 44 (agreeing that protecting the Minnesota and 44-State entities is not among the
 17 “scientifically supported ways to list and protect gray wolves across the lower-48 States”).

18 * * *

19 In summary, the “question in every case is, simply, whether the statutory text forecloses
 20 the agency’s assertion of authority, or not.” *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 301
 21 (2013). The Service removed ESA protections for two entities that the Service could not lawfully
 22 protect as separate species under the ESA. Through almost 50 pages of argument, Plaintiffs do
 23 not contest this point. The Court therefore should venture no further; it should reject Plaintiffs’
 24 challenge to the 2020 Rule and grant the Service’s motion for summary judgment.

25 **B. The Service rationally concluded that gray wolves were recovered.**

26 The Service’s threshold “species” determination cleared the legal landscape. Gray wolves
 27 in the current configurations—the Minnesota and 44-State entities—are not valid “species”
 28 under the ESA. The Service nonetheless continued its analysis and considered whether other

1 populations or configurations of gray wolves covered by the previously listed Minnesota and 44-
 2 State entities met the definition of a threatened species or an endangered species. AR_44. As
 3 noted, any asserted flaws in this precautionary analysis could not render unlawful the Service's
 4 threshold determination that the Minnesota and 44-State entities are not protectable species and
 5 should be removed from the ESA's lists. But, if the Court proceeds past this determination
 6 (which it need not do), the Service evaluated the best scientific and commercial data available
 7 and rationally concluded that gray wolves were recovered in the lower 48 States in large part
 8 because of the composition, biological status, and level of threats to core wolf metapopulations
 9 in the Great Lakes and NRM regions. AR_153.²⁵

10 Plaintiffs disagree with the Service's expert analysis and conclusions and raise two
 11 related arguments disputing wolf recovery in the lower 48 States: (1) the Service ignored all
 12 extant wolf populations but those in the Great Lakes (Pls. Br. at 11-13); and (2) the Service
 13 failed to analyze threats in a significant portion of the range of gray wolves in the lower 48 States
 14 (Pls. Br. at 18-28). Both arguments rest on the flawed premise that two expansive wolf
 15 metapopulations cannot anchor the wolf species in the lower 48 States and establish its recovery.
 16 As the Service determined, based on the best available scientific evidence, they can; gray wolves
 17 have met criteria demonstrating their recovery in the lower 48 States.

18 **1. The Service properly analyzed all wolves in the lower 48 States.**

19 Plaintiffs' main argument is that the Service "failed to evaluate," "failed to analyze," or
 20 just plain "ignored" all wolves outside of "one or two 'core' populations" in the lower 48 States.

21 ²⁵ Plaintiffs have petitioned the Service to list new gray wolf entities based on new facts,
 22 including regulatory changes in Idaho and Montana. *See* n.22, *supra*. These petitions recognize
 23 that the ESA's petition process—not litigation focusing on past agency actions—represents the
 24 appropriate mechanism to address new and emerging information. And the Service will address
 25 those petitions in due course. But the 2020 Rule must be reviewed based on the evidence before
 26 the agency when it promulgated the rule, not judged in hindsight based on post-decisional
 27 developments. Plaintiffs and amici cannot reasonably claim that the Service violated the law by
 28 disregarding documents and events that occurred after the Service issued the 2020 Rule. The
 Court therefore should not address Plaintiffs' and amici's arguments based on post-decisional
 information or events (Pls. Br. at 32 n.19; *id.* at 35 n.23; ECF 71-1 and 71-2; *see also* ECF 86-1
 at 2, 13-15; 87-1 at 9-16), as doing so would exceed the limited scope of judicial review under
 the APA, *see United States v. Carlo Bianchi & Co.*, 373 U.S. 709, 715 (1963) (APA review
 considers "the reasonableness of what the agency did on the basis of the evidence before it").

1 Pls. Br. at 11-13. Plaintiffs’ hyperbole of “one or two ‘core’ populations” and a systemic “failure
2 to analyze” does not cast shade on the Service’s 2020 Rule.

3 The Service’s 2020 Rule analyzed—in depth—the status of and threats to wolves
4 throughout all of the lower 48 States, including wolves in the West Coast States and Colorado.
5 *See* AR_143 (analyzing wolves in the NRM, West Coast States, and Colorado); *see also, e.g.,*
6 AR_47-49, 52, 116, 145, 151. The Service performed this analysis in the context of not just “one
7 or two ‘core’ populations,” as Plaintiffs state. Pls. Br. at 13. The “core” metapopulations consist
8 of over 6,000 wolves occurring in connected populations that occupy vast areas of secure habitat
9 throughout the NRM and Great Lakes regions—metapopulations connected genetically to nearly
10 30,000 wolves in Canada and that are actively recolonizing the southern Rocky Mountains, the
11 West Coast States, and other vacant suitable habitats. AR_424-25.

12 The Service’s analysis of West Coast wolves highlights that it fully analyzed all wolves
13 in the lower 48 States. Plaintiffs argue that the Service should not have treated West Coast
14 wolves as the western front of an expanding NRM wolf population. Pls. Br. at 13-18. Initially,
15 these arguments concede the Service analyzed West Coast wolves and did not ignore wolves
16 outside the Great Lakes region. More broadly, however, Plaintiffs’ arguments mischaracterize
17 the Service’s analysis.

18 First, Plaintiffs argue the Service defined the boundaries of the NRM wolves differently
19 in 2009, thereby creating an unexplained inconsistency in its definition of the NRM population’s
20 boundary in 2020. Pls. Br. at 14. A population’s boundaries are based on biology, and the NRM
21 population’s distribution changed in the decade from 2009 to 2020. *See* 74 Fed. Reg. at 15126-28
22 (defining the NRM boundaries in 2009, in part based on then-known wolf distribution and
23 dispersal distances); AR_48-49 & Fig. 2 (addressing the changes to the NRM population’s
24 distribution over time).²⁶ The Service therefore did not weigh the *same* facts differently; the facts
25 simply changed. *See Defenders of Wildlife v. Zinke*, 856 F.3d 1248, 1263 (9th Cir. 2017)

26 ²⁶ In 2008, two wolves occurred outside the NRM boundaries in Washington State, and genetic
27 analysis revealed that they likely originated from British Columbia rather than the NRM
28 population. 74 Fed. Reg. at 15,128. By 2020, the genetic data revealed that NRM wolves
expanded outward into Washington, Oregon, and California. *See, e.g.,* AR_115.

(rejecting arguments of unexplained inconsistencies when the purportedly inconsistent findings “evaluated substantially different” things); *Humane Soc’y of the United States v. Locke*, 626 F.3d 1040, 1051 (9th Cir. 2010) (rejecting categorical rule that an agency must explain tension “between current and earlier factual determinations”).

Plaintiffs next make an unqualified assertion that the Service considered *only* geographic distance when evaluating the relationship between NRM and West Coast wolves. Pls. Br. at 16 (the Service placed a “singular reliance on distance” in evaluating these wolves); *id.* at 17 (the Service considered “only physical separation” between NRM and West Coast wolves). Yet the Service considered the genetic relationships between NRM and West Coast wolves when evaluating whether they constituted part of a larger wolf population in the west. *See, e.g.*, AR_44, 47, 115.

The Service, for example, considered Hendricks et al. (2018), which evaluated genetic data and modeling for wolves in the West Coast States, AR_44, 115 (discussing AR_5499-5500).²⁷ The authors concluded that all Oregon wolves contained genes from, and thus descended from, NRM migrants. AR_5500. California wolves descended from Oregon wolves and thus also descended from NRM wolves. AR_2342.²⁸ Washington State wolves “have more complex ancestry with some individuals of [Montana] ancestry only and several other individuals with admixed ancestry” from NRM and coastal British Columbia wolves. AR_5550. Washington thus may represent a mixing zone between the expanding coastal British Columbia and NRM populations. AR_5499-50. Even then, wolves with coastal wolf ancestry are not genetically predisposed or uniquely adapted to coastal habitats. AR_5500 (“individuals with coastal ancestry can occupy interior habitat as well as coastal habitat”). The Washington wolves with coastal wolf ancestry in fact occupied *inland* habitats characteristic of the NRM, not coastal ecotypes, AR_5499, consistent with ample data that wolves “are habitat generalists and can

²⁷ The Service relied on the Hendricks study, pages 142-143, which is AR_5490. *See* AR_44. Plaintiffs, however, dispute the Service’s analysis by citing a *different* study. Pls. Br. at 16 n.13 (citing AR_6214). Plaintiffs’ mistake identifies no flaw with the Service’s analysis.

²⁸ The original breeding female of the Lassen pack in California is not closely related to Oregon wolves, and it is believed that she dispersed from another part of the NRM population. AR_2342.

1 reproduce and survive nearly anywhere,” AR_110. Based on this and other evidence reviewed,
 2 the Service rationally concluded NRM wolves are expanding into the West Coast States and
 3 those colonizing wolves constitute the western expansion of the NRM population, not a separate
 4 population of wolves protectable as a DPS. *Id.*

5 Plaintiffs respond by arguing the Service’s analysis is focused only on “distance”
 6 between wolves in the NRM and West Coast States, while also admitting the Service considered
 7 genetic relationships between wolf populations. Pls. Br. at 16 n.13. Plaintiffs also dispute the
 8 Service’s analysis of genetic data by relying on a different study than the one the Service
 9 addressed. *Id.* And Plaintiffs have petitioned the Service to combine the NRM and West Coast
 10 wolves into a single distinct population, *see* AR_5978, betraying their arguments that West Coast
 11 wolves are not actually part of an expanding western metapopulation. In the end, these
 12 arguments confirm that Plaintiffs cannot generate evidence showing the Service considered
 13 Great Lakes wolves to the exclusion of all other wolves in the lower 48 States.

14 Nor can Plaintiffs show the Service’s reliance on two metapopulations to establish wolf
 15 recovery is legally inappropriate. Plaintiffs contend that wolf recovery depends on abundant,
 16 robust wolf populations in the West Coast States, Colorado, and elsewhere. *See, e.g.*, Pls. Br. at
 17 12-13 (arguing wolves must be recovered in geographic areas, not as a “species”). Michigan and
 18 Oregon take the argument even further, asserting that the Service must ensure recovery of
 19 individual “long-distance dispersing wolves.” ECF 83-2 at 2, 6.²⁹ But the ESA expressly ties
 20 recovery to the “species,” not geography, by defining “species” and then framing recovery in
 21 terms of the status of and threats to the species. 16 U.S.C. § 1532(3). The ESA therefore does not
 22 mechanically relate recovery to the number of individual animals present, the percent of range
 23 occupied, or even whether the species’ status leaves room for improvement. *Id.*³⁰

24
 25 ²⁹ Inconsistently, these States also argue the Service must apply the ESA by State, instead of to
 26 the “species.” ECF 83-2 at 7 (arguing the Service must apply the statutory inquiry to wolves in
 27 each State, rather than to the listed entities or a valid “species”). These arguments reflect policy
 positions, not efforts to apply the law as written. *See* 16 U.S.C. § 1533(a)(1) (unambiguously
 requiring a five-factor inquiry for the “species,” not animals in individual States).

28 ³⁰ Various amici neglect this point by relying on a peer reviewer to argue that additional wolf
 populations could “contribute to metapopulation resiliency.” ECF 86-1 at 20. Any species could

For these reasons, the Service has interpreted the ESA as not requiring it “to restore the gray wolf (or any other species) to its entire historical habitat, or any specific percentage of currently suitable habitat.” AR_51; AR_116 (“Neither the Act nor our regulations require that a listed species be restored to any threshold amount of its historic range before it may be delisted.”). The Ninth Circuit agrees, explaining that a “species with an exceptionally large historical range may continue to enjoy healthy population levels despite the loss of a substantial amount of suitable habitat. Similarly, a species with an exceptionally small historical range may quickly become endangered after the loss of even a very small percentage of suitable habitat.” *Defenders of Wildlife*, 258 F.3d at 1143. So too here. The Service properly tethered recovery to the species’ status, and its expert findings on the recovered status of the core wolf metapopulations in the United States are entitled to deference. *Trout Unlimited*, 559 F.3d at 959 (“It is not our role to ask whether we would have given more or less weight to different evidence, were we the agency. Assessing a species’ likelihood of extinction involves a great deal of predictive judgment. Such judgments are entitled to particularly deferential review.”).

2. The Service rationally analyzed the status of and threats to wolves in significant portions of their range in the United States.

Plaintiffs next challenge the Service’s analysis of whether any entity it considered is threatened or endangered in a “significant portion of its range.” Pls. Br. at 18-28. In analyzing whether gray wolves were either an endangered species or a threatened species throughout a significant portion of their range (SPR), the Service must consider whether portions of the wolf’s current range where wolves may be at greater risk are “significant.” *See* 16 U.S.C. § 1532(6) (a species is an endangered species if it “is in danger of extinction throughout all or a *significant portion of its range*”) (emphasis added); *id.* § 1532(20) (same). Plaintiffs’ arguments here largely repackage their threshold critique that the Service should have protected wolves in the lower 48 States based on threats existing in specific geographic locations, like the West Coast States or southern Rocky Mountains. These repackaged arguments fare no better.

become more resilient and improve its status. That theoretical inquiry, however, fails to address whether the species is threatened, endangered, or recovered for purposes of a listing analysis.

1 First, the Service properly applied the statutory inquiry to the wolf entities considered in
 2 the 2020 Rule.³¹ For each entity evaluated, the Service considered whether wolves in that entity
 3 were in danger of extinction or likely to become so in the foreseeable future throughout all of
 4 their range based on its assessment of identified threats, which are expounded on below. After
 5 answering no to that question, the Service considered whether there were any significant portions
 6 of each entity's range where the entity may be in danger of extinction or likely to become so in
 7 the foreseeable future. *See* AR_140. The Service rationally concluded that there were no portions
 8 outside of the Great Lakes States where (1) wolves face greater threats and therefore could
 9 potentially be endangered or threatened, and (2) the portions may be "significant" because they
 10 were not "biologically meaningful in terms of the resiliency, redundancy, or representation of the
 11 entity being evaluated." AR_138.

12 The Service's approach to evaluating significance was reasonable. *Cf.* Pls. Br. at 21-22.
 13 After years of litigation over the meaning of "significant portion of the range," the Service
 14 collaborated with NMFS to issue a policy interpreting the phrase. 79 Fed. Reg. 37,578 (July 1,
 15 2014) (SPR Policy). Among other things, the policy sets forth a definition of "significant," 79
 16 Fed. Reg. 37,609, which was later challenged and vacated by several district courts.³² Without
 17 any generally applicable interpretation, the Service interpreted that statutory phrase for the 2020
 18 Rule through notice and comment procedures. As explained below, the Service's interpretation is
 19 properly entitled to controlling weight. *See generally Friends of Animals v. Haaland*, 997 F.3d
 20 1010, 1015 (9th Cir. 2021) ("the Court also reviews agency rulemaking under the two-step
 21 *Chevron* framework") (citation omitted); *Oceana, Inc. v. Pritzker*, 75 F. Supp. 3d 469, 487
 22 (D.D.C. 2014) (when the ESA "does not define how the concept is to be measured . . . the
 23 agency therefore has discretion to make this determination on the basis of its own expertise").

24 _____
 25 ³¹ Plaintiffs never identify the "object" of the "significant portion of its range" inquiry. Under the
 26 ESA, a "significant portion of its range" analysis matters only when performed in relation to the
 Service's review of a protectable "species." 16 U.S.C. § 1532(6), (20). Neither listed entity the
 Service acted on in the 2020 Rule constitutes a protectable species.

27 ³² *See, e.g., Desert Survivors v. U.S. Dep't of Interior*, 321 F. Supp. 3d 1011 (N.D. Cal. 2018).
 28 The *Desert Survivors* court later clarified that its vacatur of the policy's definition of
 "significant" applies nationwide. 336 F. Supp. 3d 1131 (N.D. Cal. 2018).

1 The Service explained in the final rule how it interpreted significance and how it applied
 2 that interpretation. *See, e.g.*, AR_114 (“For the gray wolf entities addressed in this rule, we
 3 assessed ‘significance’ based on whether portions of the range contribute meaningfully to the
 4 resiliency, redundancy, or representation of the gray wolf entity being evaluated without
 5 prescribing a specific ‘threshold.’”). The Service did not create the concept of “resiliency,
 6 redundancy, or representation” for this rule. It is based on peer-reviewed scientific literature and
 7 the Service has routinely applied these principles in, and before, the SPR policy. *See* 79 Fed.
 8 Reg. at 37,581 (“We evaluate biological significance based on the principles of conservation
 9 biology using the concepts of redundancy, resiliency, and representation (the three R’s).”);³³ *see*
 10 *also* AR_140 (“To sustain populations over time, a species must have a sufficient number and
 11 distribution of healthy populations to withstand annual variation in its environment (resiliency),
 12 novel changes in its biological and physical environment (representation), and catastrophes
 13 (redundancy).”) (citing AR_40599, 602, AR_25132); AR_51 (gray wolf recovery criteria align
 14 with the “conservation biology principles of representation (conserving the adaptive diversity of
 15 a taxon), resiliency (ability to withstand demographic and environmental variation), and
 16 redundancy (sufficient populations to provide a margin of safety”).

17 The Service adequately explained how it applied these principles. The Service’s
 18 evaluation of resiliency included wolves’ high reproductive capacity and genetic diversity.
 19 AR_146 (“Those factors provide resiliency in the face of stochastic variability (annual
 20 environmental fluctuations, periodic disturbances, and impacts of anthropogenic stressors).”).
 21 The Service defined “representation” as “the ability of a species to adapt to changing
 22 environmental conditions over time,” and explained the source of the definition and how it was
 23 applied. AR_114 (“We use Smith et al.’s (2018) [AR_25132] definition of representation ... by
 24 asking whether the species has sufficient adaptive diversity such that it is not in danger of
 25 extinction or likely to become so in the foreseeable future. Adequate representation does not
 26 require preservation of all adaptive diversity to meet this standard under the Act.”); *see also*

27 ³³ The courts vacating the SPR Policy did not hold that the Service’s use of the three R’s was
 28 unlawful or arbitrary and capricious.

AR146 (“Life-history characteristics of the wolf, including high dispersal capability and adaptability, along with the high genetic diversity evident in wolves in the Great Lakes area, provides sufficient adaptive capacity such that their long-term survival is assured.”). Finally, in evaluating representation, the Service considered whether the portion is “an isolated population with unique or markedly different genotypic or phenotypic traits that is evolving separate from other wolf populations,” and whether it is well-represented in the rest of the entity. *See, e.g.*, AR_145. For each entity assessed in the rule, the Service identified portions of the entity’s range where gray wolves face greater threats and therefore may be endangered or threatened and then determined that none of those portions was significant. *See, e.g.*, AR_152-53.

Plaintiffs raise several alleged flaws in the analysis, none of which withstands scrutiny. First, they argue repeatedly that the Service applied a “meaningless,” “standardless” inquiry. Pls. Br. at 21. The Service used a specific, defined standard—“whether portions of the range contribute meaningfully to the resiliency, redundancy, or representation of the gray wolf entity” to determine whether any portions where the entity may be endangered or threatened could be significant. AR_114. This standard does not lose meaning because Plaintiffs prefer a different, unarticulated standard that would eliminate the Service’s discretion. Indeed, many standards do not impose quantitative, bright-line tests but still present “meaningful” and legally appropriate standards. In *Weyerhaeuser Co. v. FWS*, 139 S.Ct. 361 (2018), for example, the Supreme Court recently concluded that a highly discretionary standard—one requiring the Service to “tak[e] into consideration” various factors and weigh “benefits” generally—presented a “‘meaningful standard against which to judge the agency’s exercise of discretion.’” *Id.* at 371-72 (quoting 16 U.S.C. § 1533(b)(2), and *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993)). The Ninth Circuit likewise has upheld the Service’s DPS Policy, which sets forth a flexible, discretionary, and “open-ended” inquiry. *Ctr. for Biological Diversity*, 868 F.3d at 1060. These examples refute Plaintiffs’ position that any standard without quantifiable, bright-line rules is meaningless and unlawful.

Second, Plaintiffs err in relying on possible “range contraction” from the loss of West Coast and central Rocky Mountain wolves. *See* Pls. Br. at 23-24 (citing findings made for other species in the context of the DPS analysis). Their “range contraction” theory is indistinguishable

1 from “significant gap in the range,” which the Service declined to adopt as a factor in the SPR
 2 analysis. *See* 79 Fed. Reg. at 37,594 (“We deliberately chose not to use the phrase, ‘significant
 3 gap in the species’ range’ because that is a factor in the DPS Policy, and ‘significant’ in the SPR
 4 phrase is not the same as ‘significant’ in the DPS Policy.”). Plaintiffs make a similar error in
 5 arguing that the Service should have considered whether “peripheral populations” are found in a
 6 unique ecological setting or if their genetic characteristics “differ[] markedly” from other
 7 populations. *See* Pls. Br. at 24-25. Like “significant gap in the range,” those concepts from the
 8 DPS policy do not directly apply to the SPR inquiry, and the Service therefore did not overlook a
 9 relevant factor. *Cf. id.* at 24.

10 Third, Plaintiffs’ discussion of “peripheral populations,” Pls. Br. at 24-27, restates
 11 Plaintiffs’ flawed arguments about the genetic traits of West Coast wolves. *See* Section IV.B.1.,
 12 *supra*. The 44-State entity that was previously listed as endangered encompasses: (1) a core
 13 population in the Great Lakes; and (2) wolves in the West Coast States that descended from
 14 NRM wolves. The West Coast wolves, although part of the 44-State entity, are not biologically
 15 significant to that entity because they are part of the NRM metapopulation. AR_145 (West Coast
 16 and Colorado wolves are not meaningful to redundancy or resiliency because they occur in small
 17 numbers and are part of the currently recovered and stable NRM metapopulation, and they are
 18 not meaningful to representation because they are not genetically distinct from NRM wolves).³⁴
 19 Wolves at the fringes of the Great Lakes population are not significant for a different reason:
 20 they are not needed to ensure the viability of the large, stable Great Lakes metapopulation.
 21 AR_144. This is not “inconsistent reasoning.” Pls. Br. at 25. It appropriately accounts for
 22 biological differences between gray wolves in the 44-State entity.³⁵

23 ³⁴ One peer reviewer stated that recovery requires “many large populations arrayed across a
 24 range of ecological settings,” and that representation does not apply at the species level. *See* Pls.
 25 Br. at 25, n.16. The Service considered and responded to this comment. *See* AR_114 (“While
 26 Shaffer and Stein (2000) introduced the concept of representation in the broad context of
 conserving biodiversity across ecosystems, we apply their concept at the species level, consistent
 with Smith et al. (2018).”).

27 ³⁵ Plaintiffs’ view that the Service conflated “the two prongs of the listing inquiry,” Pls. Br. at
 28 26, ignores the central defect in their challenge—*they* ignore the first step by failing to address
 whether the listed entities, or any other, constitute a “species.” *See* Section IV.A., *supra*. In any

Fourth, there is no merit to Plaintiffs' argument that the Service must consider "all areas where wolves had been sighted throughout the United States." *See* Pls. Br. at 27; *see also* ECF 83-2 at 5-7 (arguing that the Service must "explain why gray wolves are not endangered wherever they currently exist") (emphasis in original); ECF 86-1 at 17 (arguing that the Service erred in excluding dispersing wolves within its definition of current range). Plaintiffs concede that "courts have accepted [the Service's] interpretation of 'range' for the purpose of ESA's SPR policy as 'current range.'" Pls. Br. at 29. Still, they question the scope of the current range identified by the Service. Plaintiffs' objection to the Service's assessment of current range is puzzling, because the map at Figure 2 of the final rule depicts a current range consistent with that identified by two of the Plaintiffs in the December 2018 listing petition. *Compare* AR_49 (Figure 2), *with* AR_2794 (Figure 3); *see also* AR_2796 (Figure 4); AR_22018 (Petition Appendix A) (no "extant gray wolf population" in any of the States listed in Plaintiffs' brief). The Service explained that it determined current range based on existing data of wolf groups or packs and excluded individual dispersing wolves because they "do not have a defined territory or consistently use any one area." AR_106; *see also* AR_113 ("the Northeastern United States does not merit evaluation as a significant portion of the species' range because the best available science indicates that this area is unoccupied"). The Service's focus on wolf packs, not the land that they occupy, follows its SPR policy. 79 Fed. Reg. 37,593 ("The biologically based definition [of significant] in our draft policy refers to the biological organisms, not the geographic area."); AR_140, n.6 ("portion of its range" refers to the individual wolves within a particular area of the species' current range, not the habitat itself). "This is because, while 'portion of the range' is part of the species' range (i.e., a geographical area), when we evaluate a significant portion of its

event, Plaintiffs misapprehend how the SPR inquiry is applied in practice. If a portion of a species' range is not significant, then the extinction risk in that area is irrelevant because a portion must meet both prongs to warrant listing. *See* AR_140 (SPR inquiry asks whether there is "any portion of the species' range for which it is true that both (1) the portion is significant; and (2) the species is in danger of extinction now or likely to become so in the foreseeable future in that portion"); *id.* ("Regardless of which question we address first, if we reach a negative answer with respect to the first question that we address, we do not need to evaluate the other question for that portion of the species' range.").

1 range, we consider the contribution of the individuals in that portion.” *Id.* Plaintiffs may prefer a
 2 different definition of a species’ range, but that is a policy preference and not a basis to overturn
 3 the Service’s reasoned decision.

4 In short, Plaintiffs’ challenges to the Service’s SPR analysis are characterized by an
 5 unsupported legal principle—the need to set out quantitative standards amenable to bright-line
 6 inquiries—and factual attacks that disregard the Service’s comprehensive analysis of wolf threats
 7 throughout all portions of its range in the lower 48 States. Plaintiffs prefer different
 8 methodologies and disagree with the Service’s conclusions, but that does not mean the Service’s
 9 approach and analyses are arbitrary or capricious. *See River Runners for Wilderness v. Martin*,
 10 593 F.3d 1064, 1070 (9th Cir. 2010) (“The APA does not allow the court to overturn an agency
 11 decision because it disagrees with the decision or with the agency's conclusions about
 12 environmental impacts.”) (citation omitted).

13 **C. The Service’s five-factor inquiry considering threats to gray wolves is**
 14 **reasoned.**

15 The Service followed the ESA and its implementing regulations in reaching its 2020
 16 determination that no populations of gray wolves meet the definition of a threatened or an
 17 endangered species. *See* 16 U.S.C. § 1533(c)(2); 50 C.F.R. § 424.11(e)(2). The same factors
 18 considered in determining whether to list a species apply to delisting determinations. *Id.*; *see also*
 19 16 U.S.C. § 1533(a)(1).³⁶ In evaluating these factors, the Service must rely on the “best scientific
 20 ... data available.” *Id.* § 1533(b)(1)(A). “[T]he Service’s evaluation of this data falls within its
 21 area of expertise and is entitled to deference by the court.” *Defenders of Wildlife v. Zinke*, 849
 22 F.3d 1077, 1089 (2017) (citation omitted).

23 The Service relied on the best scientific and commercial information available to it
 24 during the rulemaking to identify conditions that may negatively affect individual gray wolves
 25 (“threats”), as well as conditions that may ameliorate the threats. *See* AR_53. The delisting rule

26 ³⁶ The factors are: “(A) the present or threatened destruction, modification, or curtailment of its
 27 habitat or range; (B) overutilization for commercial, recreational, scientific, or educational
 28 purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E)
 other natural or manmade factors affecting its continued existence.” *Id.*

1 identifies threats to gray wolves, discusses the species' expected response to those threats, and
 2 analyzes the effects of the threats at the individual, population, and species level. *Id.* The Service
 3 identified several threats that could harm wolves within the lower 48 States: human-caused
 4 mortality, habitat and prey availability, disease and parasites, genetic diversity and inbreeding,
 5 and climate change. It evaluated each of these threats individually and cumulatively for each
 6 entity it analyzed, reasonably determining that the threats do not rise to such a level that gray
 7 wolves are currently in danger of extinction or likely to be so within the foreseeable future. *See*
 8 AR_142 (Minnesota); AR_145 (44-State entity); AR_149 (combined listed entity); AR_153
 9 (lower 48 States entity).

10 **1. The Service reasonably determined that gray wolves are not an**
 11 **endangered species or a threatened species because of human-caused**
 12 **mortality.**

12 Unregulated human-caused mortality was the main factor responsible for the decline of
 13 gray wolves, and it remains the most significant factor affecting long-term conservation of the
 14 species. AR_54.³⁷ The main sources of human-caused mortality are harvest (hunting), lethal
 15 control, and illegal take. AR_55. The Service exhaustively analyzed this factor not only within
 16 the listed entities, but also within the delisted NRM population. AR_54-73.

17 In general, regulation “of human-caused mortality has significantly reduced the number
 18 of wolf mortalities caused by humans.” AR_56. Further, despite “human-caused wolf mortality,
 19 wolf populations have continued to increase in both number and range since the mid-to-late
 20 1970s.” AR_72; *see also* AR_56 (“the high reproductive potential of wolves, and their innate
 21 behavior to disperse and locate social openings or vacant suitable habitats, allows wolf
 22 populations to withstand relatively high rates of human-caused mortality.”); AR_404 (because of
 23 “adaptable and resilient” pack social structure, “breeding members can be quickly replaced from
 24 either within or outside the pack” and “wolf populations can rapidly overcome severe
 25 disruptions, such as pervasive human-caused mortality or disease”); *id.* (“Wolf populations have
 26 been shown to increase rapidly if the source of mortality is reduced after severe declines.”);

27 ³⁷ Because the States will regulate harvest and lethal control after delisting, this threat is linked to
 28 the evaluation of State regulatory mechanisms, which we elaborate on below.

1 AR_405 (“High levels of reproduction and immigration in wolf populations can compensate for
2 anthropogenic mortality rates of 17% to 48%.”).

3 In the Great Lakes area, the Service expects that legal harvest and lethal control will
4 increase post-delisting, but after “an initial population decline” the population will stabilize, with
5 “fluctuations around an equilibrium resulting from slight variations in birth and death rates.”
6 AR_72-73. Wolf population numbers in the Great Lakes region “are currently much higher than
7 Federal recovery requirements.” AR_73. The Service thus expects “some reduction in wolf
8 populations in the Great Lakes area when they are delisted as States implement lethal
9 depredation control and decide whether to institute wolf hunting seasons.” *Id.* Even so, because
10 the wolf population is so robust, the State plans will allow for “maintaining wolf populations
11 well above Federal recovery targets” even with increased mortality levels. *Id.*

12 In the West Coast States, the Service assessed the prevailing data and conditions in 2020,
13 finding that significant increases in human-caused mortality were unlikely because of existing
14 State regulatory mechanisms, which “balance wolf management and wolf conservation.” AR_72;
15 *see also* AR_67 (rates of human-caused and total mortality in Oregon, which are estimated at 4
16 and 5 percent, respectively, “provide ample opportunity for continued positive population growth
17 and recolonization of suitable habitat in the State”); AR_69 (“with continued positive population
18 growth and relatively low levels of human-caused mortality, substantial opportunities remain for
19 dispersing wolves to recolonize vacant suitable habitat in Washington”). Nor did the Service
20 expect that increased levels of human-caused mortality would significantly affect “the
21 recolonization and establishment of wolves in the central Rocky Mountain States due to the life-
22 history characteristics of wolves and their ability to recolonize vacant suitable habitat.” *Id.*³⁸

23 The human-caused mortality analysis also captured the effects of lost historical range,
24

25 ³⁸ Although wolves in the West Coast and central Rocky Mountains may be at greater risk from
26 human-caused mortality because of small numbers, those wolves are not a significant portion of
27 any of the entities evaluated in the final rule. As a result, the Service did not treat those wolves as
28 a distinct entity in evaluating threats. *See, e.g.*, AR_145 (44-State entity); *id.* (“Because we did
not identify any portions of the 44-State entity where threats may be concentrated and where the
portion may be biologically meaningful in terms of the resiliency, redundancy, or representation
of the 44-State entity, a more thorough analysis is not required.”).

1 because that factor was the primary cause of range loss. *See* AR_54 (“An active eradication
 2 program is the sole reason that wolves were extirpated from much of their historical range in the
 3 United States.”); *cf.* Pls. Br. at 28-30; ECF 86-1 at 19-20.³⁹ The Service evaluated the threat of
 4 human-caused mortality based on the species’ current condition, which “reflects the effects of
 5 historical range loss.” *See* AR_53; *see also* 79 Fed. Reg. 37,584 (“If the causes of the loss [of
 6 historical range] are still continuing, then that loss is also relevant as evidence of the effects of an
 7 ongoing threat.”); *see also* *Ctr. for Biological Diversity v. Zinke*, 900 F.3d 1053, 1067 (9th Cir.
 8 2018) (deferring to Service’s interpretation of “range” as current range and upholding agency’s
 9 consideration of the species’ historical range “in evaluating the factors that contributed to its
 10 negative listing decision”). The Service provided a rational basis for concluding that the threat of
 11 human-caused mortality had been ameliorated and that lost range was not “undermin[ing] the
 12 viability of the species as it exists today.” 79 Fed. Reg. 37,584; *see also* AR_145-46 (“Although
 13 substantial contraction of gray wolf historical range occurred within the 44-State entity since
 14 European settlement, the range of the gray wolf has expanded significantly since its original
 15 listing in 1978, and the impacts of lost historical range are no longer manifesting in a way that
 16 threatens the viability of the species.”); *id.* (causes of historical range contraction (targeted
 17 extermination efforts) and effects of contraction (reduced numbers and restricted gene flow)
 18 “have been ameliorated or reduced such that the 44-State entity no longer meets the Act’s
 19 definitions of ‘threatened species’ or ‘endangered species’”).

20 Given the current stability of wolf populations and the adaptability of the species, the
 21 Service reasonably determined that regulated harvest and other sources of human-caused
 22 mortality were not a significant threat to the survival of gray wolves in the lower 48 States. *See*
 23 *Humane Society*, 865 F.3d at 608 (upholding the Service’s conclusion that “human-caused
 24 mortality was not a significant threat to the wolf’s survival, as shown by the resilient growth of

25 ³⁹ The final rule and sources cited by the Service explain the “eradication program” that was
 26 responsible for extirpating wolves from much of their historical range. *See* AR_54; *see also*
 27 AR_32217-18; AR_32986; AR_33073; *cf.* Pls. Br. at 29 (wrongly arguing that the Service failed
 28 to define the program and relied on outdated sources) (citing AR_11142-43). The Service also
 considered and responded to other peer review comments questioning its range analysis. *See*
 AR_113; *cf.* Pls. Br. at 29.

the gray wolf population despite the human-caused deaths”); *see also id.* at 609 (the “record supports the Service’s conclusion that disease- and human-caused mortality have not materially threatened the expansion of the gray wolf population in the Western Great Lakes region, and thus the Service reasonably concluded that those factors do not counsel against delisting”).

2. The Service reasonably determined that gray wolves are not an endangered species or a threatened species because of the inadequacy of existing regulatory mechanisms.

The final rule and its administrative record provide ample support for the Service’s determination that State management would effectively protect gray wolves after delisting. *See* AR_85-98. Plaintiffs’ criticism of the Service’s conclusions ignores the applicable standard of review and misstates the agency’s obligations in reviewing State management plans. *See* Pls. Br. at 31-40. The Court’s role is to determine “whether the rulemaking record demonstrates the Service exercised its judgment in a reasonable way in concluding” that State management plans will adequately protect gray wolves after delisting. *See Defenders of Wildlife*, 849 F.3d at 1083. The Service’s determination “is a quintessential judgment call that Congress left to the Secretary, and by delegation to the Service, which has years of experience in evaluating what is reasonably likely to be implemented and effective.” *Id.* (citation omitted). Plaintiffs do not meet their burden to overcome the presumption that the Service exercised its judgment reasonably.

a. Plaintiffs misstate the Service’s obligations in reviewing State regulatory mechanisms.

The Court should reject Plaintiffs’ criticisms of the Service’s analysis of State management plans because they are based on a flawed premise: that the ESA requires the Service to ensure that every provision of each State management plan is based on the “best available science.” *See* Pls. Br. at 35-37; *see also* ECF 87-1 at 7 (arguing that Wisconsin plan is based on outdated information). ESA Section 4 requires the Service to determine whether a species is endangered or threatened “solely on the basis of the best scientific and commercial data available ... after taking into account those efforts, if any, being made by any State ... to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction.” 16 U.S.C. § 1533(b)(1)(A). The

1 statute does not require the Service to substitute its judgment for that of State regulators by
 2 examining their State management plans to make a threshold finding that the plans are based on
 3 the best available science.⁴⁰ Plaintiffs cite no case law supporting this argument.

4 The relevant inquiry for the Court is whether the Service “could rationally conclude that
 5 the regulatory framework described in the Rule is sufficient to sustain a recovered [wolf]
 6 population.” *Greater Yellowstone Coal.*, 665 F.3d at 1032; *see also Defenders of Wildlife*, 849
 7 F.3d at 1084 (“That appellees disagree with the Service does not undercut its reasoned
 8 determination that ... [the State] has established an adequate regulatory framework.”).
 9 Regulatory mechanisms are not “inadequate” just because they do not “protect a species from
 10 any conceivable impact”; “the ESA requires protection only ‘against threats that would cause the
 11 species to be ‘an endangered species or a threatened species.’” *Id.* at 1087. And State
 12 management measures need not equal the protections of the ESA. *See Greater Yellowstone*
 13 *Coal.*, 665 F.3d at 1032. The final rule provides a rational basis for the Service’s determination
 14 that post-delisting management would sustain a recovered wolf population.

15 **b. The Service reasonably determined that gray wolves are not**
 16 **endangered or threatened because of inadequate regulatory**
mechanisms in the Great Lakes.

17 The Service reasonably concluded that Minnesota, Michigan, and Wisconsin “have
 18 adequate laws and regulations” to fulfill the commitments in their State management plans “and
 19 ensure that the wolf population in the Great Lakes area remains above recovery levels.” AR_56.
 20 The number of wolves in the Great Lakes area far exceeds the level required to sustain the
 21 species. The recovery plan for the Eastern United States, which applies to the Great Lakes
 22 metapopulation, has two criteria: (1) assuring the survival of the gray wolf in Minnesota; and (2)

23 _____
 24 ⁴⁰ The Service addressed this issue in the context of its 2009 rule identifying and delisting the
 25 Western Great Lakes DPS. 74 Fed. Reg. 15,070 (Apr. 2, 2009). Commenters recommended that
 26 specific changes be made to the State management plans for Michigan, Minnesota, and
 27 Wisconsin. In response, the Service explained that it reviews State plans “to determine if they
 28 will provide sufficient protection and reduce threats,” and it is “primarily concerned with the
 outcome of the plan’s implementation.” *Id.* at 15,087; *see also id.* (“Once a species is delisted,
 the details of its management are a State or tribal responsibility; the Federal responsibility is to
 monitor the plan’s implementation and the species’ response for at least five years to ensure that
 the plan’s outcome is as expected.”).

1 at least one viable population within the historical range of the eastern timber wolf outside of
 2 Minnesota and Isle Royale, Michigan. AR_51. The plan identifies a population goal of 1,251-
 3 1,400 individual wolves for the Minnesota population. *Id.* The wolf population in Minnesota was
 4 estimated at over 2,000 at the time of delisting. AR_418. The recovery plan includes numerical
 5 goals for the second population based on how isolated it is from the Minnesota population.
 6 AR_51 (if located within 100 miles then a minimum of 100 wolves for at least 5 years; if more
 7 than 100 miles then a minimum of 200 wolves). Wolves in the Great Lakes area have exceeded
 8 both criteria for the past 20 years. *Id.*; *see also* AR_0417, 420, 421 (about 2,655 wolves (465
 9 packs) live in Minnesota, 914 wolves (243 packs) in Wisconsin, and 695 wolves (43 packs) in
 10 Michigan). Although whether the species should be delisted does not hinge on whether the
 11 recovery criteria have been met, *see Friends of Blackwater v. Salazar*, 691 F.3d 428, 436 (D.C.
 12 Cir. 2012), the Service carefully considers the criteria in making listing determinations because
 13 they allow the Service to “evaluate progress toward recovery and assess the species’ likely future
 14 condition.” AR_50.⁴¹

15 Plaintiffs focus on the expected percentage decrease in wolf populations in the Great
 16 Lakes States, glossing over the magnitude by which current populations exceed the recovery
 17 criteria. Deliberate reductions in population size—which follow past practice and which the
 18 Service anticipated and factored into its analysis—are unlikely to bring the population below the
 19 recovery threshold. *Cf.* Pls. Br. at 31-35. Regardless of the methods used, wolves are not as
 20 sensitive to human-caused mortality as Plaintiffs assert. They can withstand high levels of
 21 mortality and rebound quickly, even after severe declines, if the source of mortality is reduced.
 22 *See supra* Section III.A.⁴²

23 ⁴¹ Plaintiffs characterize the recovery criteria as “outdated,” *see* Pls. Br. at 35-36, but do not
 24 directly challenge those plans or offer concrete evidence that the recovery criteria cannot achieve
 25 conservation. The Service did not have to update the recovery plans prior to delisting; the ESA
 26 does not require “that the criteria in a recovery plan be satisfied before a species may be delisted
 pursuant to the factors in the Act itself.” *Friends of Blackwater*, 691 F.3d at 436.

27 ⁴² Plaintiffs argue that State mortality levels are “unsustainable,” citing studies that they
 28 characterize as concluding that mortality rates “must be kept below 30%.” Pls. Br. at 36. The
 Service considered the sources cited by Plaintiffs and reached a different conclusion. *See*
 AR_405; *see also* AR_55 (“Similarities in survival rates among wolf populations subject to

1 Regulated public harvest occurred in the Great Lakes area during periods when wolves
 2 were delisted, and the population rebounded after the harvest ended. For example, population
 3 data reflect that past hunts in Wisconsin when wolves were federally delisted did not result in
 4 significant harm to the overall wolf population in the State. *Cf.* ECF 86-1 at 23 (alleging the
 5 Service ignored a “pattern of state overhunting of wolves”). After delisting in 2012, the State
 6 held a regulated hunting and trapping season in 2012-2013. There were 117 wolves harvested,
 7 and the minimum wolf population fell from 815 (2011-2012) to 809 (2012-2013). AR_419, 428.
 8 During the 2013-2014 hunting season, 257 wolves were harvested and the population count
 9 declined to 660 wolves. AR_419. In response to this decline, State regulators reduced the wolf
 10 quota for the 2014-2015 hunting season, from 275 to 156. *Id.* That year there were 154 wolves
 11 harvested, and the population increased to 746. AR_428. After three years of public hunting and
 12 trapping seasons aimed at reducing the number of wolves, the overall wolf population was
 13 reduced by only 8.5 percent. AR_92.⁴³

14 The hunts that occurred in Wisconsin when gray wolves were previously delisted reveal
 15
 16 different levels of human-caused and other forms of mortality” show “that moderate increases in
 17 human-caused mortality may not have a large effect on annual wolf survival.”).

18 ⁴³ Similar levels of harvest occurred after wolves were federally delisted in the NRM States and
 19 the harvest did not affect gray wolves at the population level, as seen in data showing that NRM
 20 wolf populations have remained relatively stable since hunts were begun in those States. At the
 21 end of 2000, the NRM population contained more than 300 wolves distributed among Montana,
 22 Idaho, and Wyoming. AR_412. At the end of 2015, there were more than 1,700 wolves in those
 23 three States. AR_425. The population expansion in the NRM occurred even with high levels of
 harvest and other sources of human-caused mortality. *See* AR_70 (Table 3). Beginning in 2011,
 after wolves were federally delisted in Idaho and Montana, harvest levels expanded: 200 wolves
 harvested in Idaho, compared to 46 in 2010; 121 in Montana, compared to 0 in 2010. *Id.* Harvest
 levels increased in 2012 and 2013, but overall wolf minimum counts did not vary widely in those
 years. *Id.*

24 In Idaho, the wolf population peaked in 2009 at 870, declined slightly, and then stabilized
 25 between 2010 and 2015. *Id.* This stabilization occurred despite harvest levels of 200-356 wolves
 26 per year between 2011 and 2015. *Id.* Even with harvest levels consistently remaining above 250
 27 wolves, the Idaho Department of Fish and Game estimated that there were about 1,000 wolves in
 28 the State at the end of 2019. *Id.* In Montana, the minimum count of wolves peaked in 2011 at 653
 and stabilized at 500 to 650 wolves between 2012 and 2017. AR_70. In each of those years
 except 2012, the harvest levels exceeded 200 wolves. *Id.* (175-255 per year). Using its updated
 methods for determining wolf numbers, Montana estimated at the time of delisting that its wolf
 population remained above 800 individuals each year. *Id.*

1 that State managers are capable of monitoring the results of the harvest and can respond to
 2 reduce the quota for the next year if needed. *See* AR_56 (“Using an adaptive-management
 3 approach that adjusts harvest based on population estimates and trends, the initial objectives of
 4 States may be to reduce or stabilize wolf populations and then manage for sustainable
 5 populations, similar to how States manage all other hunted species.”). They also show that States
 6 have the capability to manage wolves in a way that addresses human-wolf conflicts without
 7 causing major declines in wolf populations. *See id.* (during the three-year period that wolves
 8 were delisted, “verified wolf kills on cattle and the number of farms with verified depredations
 9 declined significantly..., indicating that active management with public harvests and targeted
 10 lethal depredation controls could reduce conflicts without causing significant declines in wolf
 11 numbers”). And if there is a decline due to harvest, the wolf population can recover quickly if the
 12 quota is reduced. AR_403-04; AR_46-47.

13 The February 2021 wolf hunt in Wisconsin does not show that the Service’s November
 14 2020 delisting rule was irrational. *Cf.* Pls. Br. at 32, n.19; ECF 86-1 at 13-14; ECF 87-1 at 21.
 15 The hunt post-dates the final rule and is not relevant to the question before the Court: is the
 16 delisting rule arbitrary or capricious based on the reasoning in the rule itself and the
 17 administrative record? *See supra* Section IV.B., n.25. But, even if the Court considers the
 18 February 2021 hunt, it does not undermine the rationality of the Service’s finding regarding State
 19 regulatory mechanisms. The Service expected that Wisconsin and other States would hold
 20 hunting and trapping seasons consistent with their State management plans. *See* AR_92. The
 21 Service adequately considered existing State regulatory mechanisms and could not have
 22 reasonably predicted that a hunt would occur in February 2021—as a result of litigation and
 23 despite the objection of the Wisconsin Department of Natural Resources—and that the quota
 24 would be exceeded. *See* 87-1 at 9-15; *see also Defenders of Wildlife*, 849 F.3d at 1088 (“the ESA
 25 does not require a regulation to address every far-fetched ‘what-if’ scenario that opponents of
 26 delisting can imagine”) (citation omitted).

27 Moreover, the outcome of a single hunt does not establish that regulatory mechanisms are
 28 inadequate. The Service’s determination was based on the size of the current population and the

1 State’s commitment to maintain a wolf population that exceeds the recovery goal. AR_92 (“WI
 2 DNR is committed to maintaining a wolf population of 350 wolves outside of Indian
 3 reservations, which translates to a State-wide population of 361 to 385 wolves in late winter. No
 4 harvest will be allowed if the wolf population falls below this goal.”); *see also id.* (Wisconsin
 5 plan “calls for State relisting of the wolf as a threatened species if the population falls to fewer
 6 than 250 for 3 years”). Consistent with its post-delisting monitoring plan, the Service will assess
 7 the effects of the February 2021 hunt, and any other sources of human-caused mortality, based
 8 on population numbers and other data provided by the State. AR_154.⁴⁴

9 The Service relied on the same State management plans in its 2011 rule designating and
 10 delisting a western Great Lakes DPS of wolves, finding that State “plans provided adequate
 11 monitoring of and protection for the wolf segment.” *Humane Society*, 865 F.3d at 594. The D.C.
 12 Circuit upheld the Service’s analysis of human-caused mortality, which relied in part on those
 13 State management plans. *Id.* at 609. Today, as in 2011, human-caused mortality has “not
 14 materially threatened the expansion of the gray wolf population in the Western Great Lakes
 15 region,” and State “plans in Minnesota, Michigan, and Wisconsin” will provide “an important
 16 backstop should new threats emerge.” *Id.*

17 **c. The Service reasonably determined that gray wolves are not**
 18 **endangered or threatened because of inadequate regulatory**
mechanisms outside of the Great Lakes.

19 The Service rationally concluded that Washington, Oregon, California, Colorado, and
 20 Utah are “committed to conserving wolves as demonstrated by the development of management
 21 plans and/or codification of laws and regulations that protect wolves.” AR_56. The West Coast
 22 States have “adopted wolf-management plans intended to provide for the conservation and
 23 reestablishment of wolves in these States.” AR_95. Their State plans “include population
 24 objectives, education and public outreach goals, damage-management strategies, and monitoring
 25

26 ⁴⁴ If the Court considers the post-decisional evidence about the 2021 Wisconsin hunt submitted
 27 by Plaintiffs and amici, the Service respectfully requests that the Court also consider the
 28 Service’s March 2021 file memorandum discussing the hunt. *See* Exhibit 1 (Memo to File re:
 Wisconsin wolf season) (March 22, 2021) (explaining that the Service will assess the effects of
 the February 2021 harvest, along with any later harvests, based on State monitoring data).

1 and research plans.” *Id.*; *see also* AR_95-96 (Oregon); AR_96-97 (Washington); AR_97
 2 (California). The plans contain conservation objectives, such as four breeding pairs for three
 3 consecutive years in each management zone (Oregon), 15 successful breeding pairs in 3
 4 geographic regions or 3 consecutive years (Washington), and 4 breeding pairs for 2 consecutive
 5 years State-wide (California). AR_96-97. The plans do not set population goals, *see* Pls. Br. at
 6 39, instead allowing State managers to set appropriate goals in the future considering the
 7 expansion of wolf populations and diverse stakeholder views. *See, e.g.*, AR_96 (Oregon plan
 8 “does not include a minimum or maximum population level for wolves”; it “leaves room for
 9 development of population thresholds in future planning efforts”).⁴⁵

10 The “deficiencies” that Plaintiffs identify, Pls. Br. at 37-41, reflect Plaintiffs’ desire for
 11 States outside the Great Lakes to take measures to support continued wolf expansion. But the
 12 Service is the expert agency charged with determining whether any deficiencies rise to the level
 13 of “inadequacies” and, if so, whether those inadequacies cause gray wolves to meet the definition
 14 of a threatened or an endangered species. The Service’s conclusion that they do not is
 15 reasonable, especially because the wolves outside the Great Lakes States are unnecessary for the
 16 recovered status of the entities that the Service evaluated. *See* AR_146 (although wolves in the
 17 West Coast States and central Rocky Mountains, and lone dispersers in other States, “would add
 18 to resiliency, redundancy, and representation, they are not necessary in order to conserve wolves
 19 to the point that they no longer meet the definitions of endangered or threatened under the
 20 Act.”).⁴⁶ Thus, the alleged flaws in State and federal management identified by Plaintiffs are not

21
 22 ⁴⁵ Plaintiffs note that the Governor of Oregon stated that Oregon’s wolf management plan “failed
 23 to meet her expectations.” Pls. Br. at 39. The Oregon Department of Fish and Wildlife, however,
 24 supported delisting, stating that it expected the number of established wolf packs would continue
 25 to expand after federal delisting. *See* AR_15874; *see also* ECF 83-2 (Oregon joining Michigan in
 26 amicus brief, opposing delisting without criticizing its own ability to manage and protect gray
 27 wolves).

28 ⁴⁶ For the same reasons, the argument advanced by the States of Michigan and Oregon also fails.
 ECF 83-2 at 7-8 (arguing that the Service should have considered certain aspects of Utah and
 South Dakota State law). The Service addressed this argument in its response to comments,
 clarifying that the threats analysis focuses on occupied range, and therefore the Service “did not
 assess the effects of threats to gray wolves in States that are not currently occupied by gray
 wolves.” AR_120.

1 material to the Service's determination.⁴⁷

2 The Court should uphold the final rule because "the record reflects that the Service
3 adequately wrestled with" the issues identified by Plaintiffs, and "grounded its decision in
4 substantial evidence." *Humane Society*, 865 F.3d at 607. Put simply, Plaintiffs have not met their
5 burden to show that the final rule is arbitrary and capricious.

6 **V. CONCLUSION**

7 This case should turn on the proper interpretation and application of the ESA, not policy
8 preferences on who should manage wolves. Congress already answered that question: States and
9 Tribes manage their resident wildlife, unless a species, subspecies, or distinct population
10 segment is threatened or endangered. The Service here concluded that the listed gray wolf
11 entities in the lower 48 States were neither a separate protectable "species" nor, based on the
12 scientific evidence, threatened or endangered within the meaning of the ESA. Under these
13 circumstances, the ESA does not allow continued federal management of gray wolves in the
14 lower 48 United States. The Delisting Rule constitutes a reasoned application of the Service's
15 authority under the ESA and is supported by the administrative record. The Court therefore
16 should uphold the 2020 Rule and grant the Service's summary judgment motion.

17
18
19 DATED: August 20, 2021

TODD KIM, Assistant Attorney General
SETH M. BARSKY, Section Chief

20
21 ⁴⁷ The Service also reasonably determined that gray wolves are not an endangered species or a
22 threatened species because of habitat and prey availability or other factors (disease and parasites,
23 genetic diversity and inbreeding, climate change). The Service evaluated habitat suitability and
24 prey availability in the Great Lakes, the West Coast States, the Central Rocky Mountains, and
25 the NRM, reasonably determining that there is sufficient suitable habitat and in the lower 48
26 States to support viable wolf populations into the future and that States will manage prey
27 populations sustainably. *See* AR_78; *see also* AR_74-76 (Great Lakes); AR_76-77 (West Coast
28 States); AR_77-78 (central Rocky Mountains); AR_76 (NRM). Wolves "can successfully
occupy a wide range of habitats" given adequate prey and control of human-caused mortality.
AR_405; *see also* AR_73 (gray "wolves are habitat generalists"). The Service also evaluated the
other threats it identified, likewise concluding that they are unlikely to significantly affect wolf
populations. *See* AR_78-80 (disease and parasites); AR_80-81 (genetic diversity and
inbreeding); AR_81 (climate change); *id.* (cumulative effects). Plaintiffs do not directly
challenge these conclusions.

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/s/ Michael R. Eitel

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U.S. Department of the Interior

Office of the Solicitor

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DEFENDERS OF WILDLIFE, et al.,

Plaintiffs,

v.

U.S. FISH AND WILDLIFE SERVICE, et al.,

Defendants.

Case No. 4:21-cv-00344-JSW

4:21-cv-00349-JSW

4:21-cv-00561-JSW

WILDEARTH GUARDIANS, et al.,

Plaintiffs,

v.

DEBRA HAALAND, U.S. SECRETARY OF
THE INTERIOR, et al.,

Defendants.

CERTIFICATE OF SERVICE

NATURAL RESOURCES DEFENSE
COUNCIL, INC.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE
INTERIOR, et al.,

Defendants.

Date: November 12, 2021

Time: 9:00 AM

Courtroom: 5

Judge: Hon. Jeffrey S. White

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Michael R. Eitel

MICHAEL R. EITEL